

MINUTES

PLANNING COMMITTEE

August 21, 2013

A meeting of the Planning Committee of the Council of the County of Kaua'i, State of Hawai'i, was called to order by Councilmember Nadine K. Nakamura, Chair, at the Council Chambers, 4396 Rice Street, Suite 201, Līhu'e, Kaua'i, on Wednesday, August 21, 2013, at 9:14 a.m., after which the following members answered the call of the roll:

Honorable Tim Bynum (*present at 9:24 a.m.*)
Honorable Ross Kagawa
Honorable Mel Rapozo
Honorable JoAnn A. Yukimura
Honorable Nadine K. Nakamura
Honorable Gary L. Hooser, Ex-Officio Member

Excused: Honorable Jay Furfaro, Ex-Officio Member

Minutes of the July 24, 2013 Planning Committee Meeting.

Upon motion duly made by Councilmember Kagawa, seconded by Councilmember Rapozo, and carried by a vote of 4:1 (Councilmember Bynum was excused), the Minutes of the July 24, 2013 Planning Committee Meeting was approved.

Minutes of the August 7, 2013 Planning Committee Meeting.

Upon motion duly made by Councilmember Kagawa, seconded by Councilmember Rapozo, and carried by a vote of 4:1 (Councilmember Bynum was excused), the Minutes of the August 7, 2013 Planning Committee Meeting was approved.

The Committee proceeded on its agenda item as follows:

PL 2013-03 Communication (08/13/2013) from Councilmember Rapozo, requesting the presence of Ian K. Jung, Deputy County Attorney, to discuss the Grant of Pedestrian and Parking Easements that was a condition of the Kahuaina Plantation Subdivision and Kahuaina Plantation Subdivision Phase II, and its impact on the location and the State's establishment of the Ala Loa Hawaiian Trail System. **[This item was deferred to September 4, 2013 with the addition of a separate item regarding Kahuaina Plantation Subdivision Phase II and schedule Executive Session briefing on August 28, 2013.]**

Mr. Kagawa moved to receive PL 2013-03 for the record, seconded by Mr. Rapozo.

Chair Nakamura:
County Attorney to come up?

Is there any discussion before we ask the

Mr. Rapozo:
first.

I will just ask that they give us the briefing

Chair Nakamura:

We would like to ask Ian Jung to come up.

There being no objections, the rules were suspended.

IAN K. JUNG, Deputy County Attorney: Good morning,
Committee Chair and Councilmembers, Deputy County Attorney Ian Jung.

Chair Nakamura: Ian, I think you are responding to a letter
from Councilmember Rapozo asking you to be here to give us some background on
this easement.

Mr. Jung: That is correct. The legal document came up
last Council Meeting and there were some questions about the effect the grant of
easement would have on a potential *ala loa* that is there. So, what I did
Councilmembers, was prepare a PowerPoint to try outline some of the issues and
also there is a request that photos be taken and inserted into a PowerPoint so you
can identify where exactly this location is. As we outline, I think we will start off
with the area description, current access to the Lepeuli Beach, the proposed grant of
easement as well the issues regarding the historic trail, and then basically a
summary of what will happen next. With an area description here, I think many of
you are familiar with this particular area because it is been highlighted in the last,
I guess, five (5) to eight (8) years with regard to trail issues out there as well as
access to Lepeuli, as well as endangered seabird, fences that have gone up, as well
as fences for cattle so that they do not go onto the beach here. The first part of
Lepeuli Beach is about a half mile beach adjacent to what is referred to as
Ka'aka'aniu Beach and Lepeuli Beach in which is west of Pākālā Point is Waipake
Beach which passes through Kulikoa Point as well as ending at Kepuhi Point. The
area frequented by beach-goers, surfers, fishermen, *limu* gatherers, and divers.

Let me show you the map here. With regard to the current access to Lepeuli
Beach and I think some of you recall what we went through in 2010, there was an
issue of the old access not being accessible. So, there was some discussion with
Wai'oli Corporation as they were proceeding through a Special Management Area
(SMA) minor permit. At the end of that, there was an access that was deeded over,
but prior to that in 1979 the County had requested from Wai'oli that an access lot
be created going through Wai'oli's property and that was to provide access to
Lepeuli Beach. The Lot 4, and this was not a grant of easement, this was actually a
subdivision which created a lot of record that would go down to Lepeuli Beach and
have an access easement. It is a narrow lot with a long dirt road, parking area, and
trail. In 2000, that Warranty Deed was actually filed with the Land Court. It is
Land Court property so it had to get filed with the Land Court to be registered and
then again, in 2010 Wai'oli Corporation provided the County with additional access
which is often referred to as the "middle trail."

Here is sort of an aerial picture of the beach area itself on the current access
and here is the roadway lot. It is actually a lot of record that goes down to the
parking lot where can you identify the cars there in the parking lot. I know many of
you have walked this and there is a great right here with a hole through the gate
where you can access, walks down to a pin line near a pine tree there and the start

of the public access lot goes around this little rock head and comes down to the beach here. The current easement that was garnered in 2010 comes down here, straight to the beach on this trail that has formed. The disputed trail, which some allege to be the historic *ala loa* and some allege it is an old dairy road, is this lateral access that sort of traverses Wai'oli property down this way, that goes eventually down to the beach. This is the Ka'aka'aniu Beach and this is the start of Lepeuli Beach, which I said is half a mile. Should I move on?

Chair Nakamura:

Any questions about the map? Go ahead.

Mr. Jung: This is the entirety of Lot 4 here which is the Count lot that leads down to Lepeuli Beach through Wai'oli property and you can see it at the end there. So, it is a fairly long road, about a mile long, and then this is the lot. I will blow up that map for you guys. So, what we have here is the end of the parking lot and the access lot that goes down, you can see it does a few switch backs before it laterally across to head horizontally to the fronting of Lepeuli Beach there. This dotted line was the excerpt from the Grant of Easement that was given by Wai'oli to the County and this dotted line here is that easement, which it taps into our lot of record and then continues on to the beach there. So, that is basically the current access of what we are looking at. Sorry, this thing is really slow because I put a lot of pictures in here so you folks can see.

What we are looking at now, which was the legal document before you last Council Meeting, was basically a requirement as the condition of the subdivision to provide pedestrian access. It is a parking easement that runs along the eastern portion of the property line and starts at the southeast corner and the pedestrian easement runs along the eastern property line all the way down to the shoreline. In 2008 the Planning Department, the applicant, interested parties, and Department of Land and Natural Resources (DLNR) had input as to where to locate this proposed easement. The basis for why we are even here in the first place is through a Hawai'i Revised Statutes (HRS) provision 46-4.6, which allows the Counties to go in and exact upon landowners asking for subdivisions of six (6) lots or more. We can start our pedestrian access easement at the start of the public highway of public street to the land below the high watermark of the shoreline. This basic the subdivision map and this is the lot that was subdivided. You can see the interior lots that were created. This created eleven (11) lots in there and this orange-yellow line is the easement that runs along the eastern portion of the property line.

Here is a larger aerial pictometry picture of it where this is the lot of record. These small ones were old *kuleana* lots and you cannot really see it, but here is Parcel 10 and this is Parcel 6, the main parcel which our easement will run through newly created Lots 15A, 15D, and 15K. So, just to give you a walking tour of the access area, given the request to have photos, here is the start of the southeast corner of the property line where the entrance will be for the parking easement. This is Ko'olau Road and it is a paved cement pathway here and currently there is a gate here. But this is exactly where the entrance will be if you folks as approve the proposed Grant of Easement. This would be the parking area and in the text of the Grant of Easement, it will be about a forty (40) foot wide parking area. This is basically the first leg of the proposed access and I know it is kind of dim so maybe we can dim the lights a little more and you can kind of see the topography. The topography here, you can note that it is pretty level and it is a slow incline that goes down, that is the first leg. The second leg here kind of continues on down through some nice trees for shade if you want to stop and take a break. This is the third leg and again, it is about a mile long, so it is a decent walk, where it starts to incline

slowly down to the beach bluff are and here is where you have to descend sort of into a little valley to get down to the bluff area, but not steep at all. Then the leg that starts to go into the Conservation District where the trees still remain, it kind of goes along. This is not specifically where the Grant of Easement will be because it is pretty vegetated right now, but eventually when we go in for the Conservation District Use Permit to layout the trail, we will have to do some clearing to establish basically the vista from Pākalā viewpoint and this is the channel which many of you are familiar with that the water flows from Lepeuli Beach here and also from Waipake Beach here out there. This is the western view of Lepeuli Beach where the access will come out right here on the western side of the beach versus our current access, will displace you right onto the eastern portion of Lepeuli Beach.

Now, there has been a lot of discussion of what the *ala loa* is and it is a debate going on the last five (5) to eight (8) years and well where that, but it has been highlighted in the last five (5) years. What I did is I took a look at what an *ala loa* basically in the Hawaiian Dictionary. This is just a primer, I am not trying to say what exactly the *ala loa* is. This is just historical resources that you can use to try and define what the *ala loa* is. In the Hawaiian Dictionary, Pukui & Elbert, they define it as a highway, main road, belt road, around an island, basically a long road versus A Dictionary of the Hawai'i Language from Andrews breaks it up into *ala* being path and *loa* meaning long, but still identifies it as a highway path, a synonym with *alanui*. I pulled the definition *alanui* which basically means path and *nui* mean large and refers back to it as a highway, a road, or a frequented path.

So, status of the historic trail, just so the Councilmembers are aware, we have been dealing with this issue in the Open Space Commission for quite some time since I have been with the County. There have been several communications back and forth with the State. Just so you know, the way this works is the State has jurisdiction over the Highways Act of 1892. So, if the State is going to claim the *ala loa* as an historic trail which would fall under the Highways Act of 1892, they would be the ones to assert a claim. This sort of came to ahead earlier in July where the Open Space Commission voted to ask the DLNR to give us an update and strongly encourage them to start moving on what they are going to do with the alleged Ala Loa. So, the Open Space Commission, commissioned the Planning Director to basically issue a letter to Bill Aila to say, please give us an update as well as strongly encouraging them to move forward on resolving the issue. In August 8, 2013, DLNR responded that it does not have current plans to take action on the trail. So, at the end of the day the location or even existence remains unresolved until we look at either litigation between the State as well as any type of agreement between DLNR and landowners. What I wanted to do here is basically give you...I apologize I thought this would have blown up a little larger, but we can get you these documents. This was July 12, 2013 letter that the Open Space Commission requested of the Planning Director, issued to DLNR and then this is the DLNR response and we can get you those letters.

Mr. Rapozo:

Real quick question.

Chair Nakamura:

Go ahead.

Mr. Rapozo:

Do you have it in your possession?

Mr. Jung:
E-mail here which I could get.

I do not have those, but I have it on my

Mr. Rapozo: We will have our staff get it from the Department of Planning because I would like to see those letters.

Mr. Jung: Sure. In looking at how we get to this dispute, we have to look at historic maps which do indicate a trail, you look at historical text that indicates a trail, but the bottom line is until the State takes action on its claim the location and existence of the historic trail will continue to remain in dispute. The way to resolve this dispute is through a legal action called "Quiet Title Action." This can be done by State or the landowner which could eventually resolve this dispute we are in. One of the documents that was proffered as a fact that State does have a trail is actually from a 2005 Quiet Title Action between the State and Falko Partners, I am sorry. It was Falko Partners and several *kuleana* owners as well as the State as a party. There was a stipulation to dismiss the State out of it. The State basically reserved the right to claim an ancient trail affecting Parcel 10 and I just wanted to highlight where the State's claim is outlined in this stipulation to dismiss the State out of the Quiet Title Action, affects really only Parcel 10 and where we are going to be having our access easement is over here. Now, that does not go to say that the State still does not have a claim to this. But in a legal document, that is what they claimed over Parcel 10 there which this is the western portion of the property where DLNR as well as some of the interested parties did not want the access to versus the eastern part is where we are looking at locating the parcel, more towards the nicer side of the beach. The State did recognize it has a claim to it, but has not asserted that claim as of yet and based on the previous letter we just saw, they have no plans to assert a claim.

There is also historical maps which I think Hope Kallai is really good about taking these historic maps and they are registered maps 432 and 1395 which – and I apologize again, this is so small. I thought it would blow up larger on the screen. Here is the *ahupua'a* of Lepeuli as well as Waipake. If you look here there is a dotted line which on that registered map, there is an allegation there is an historic trail there. Whether or not it was the *ala loa* that is what is in dispute because there are two (2) interpretations of *ala loa* as I understand it. I am not saying I am an expert, but there is a coastal *ala loa* as well as an interior *ala loa* because people will traverse the island and some people want to traverse the island in a more direct route, some people would prefer to traverse the island in a longer, scenic route to get to the ocean resource. If you look at historical text and this was a book by Chester Lyman, the Sandwich Islands and California. If you look here in the text that he wrote on his journey, "After passing Moloa'a we passed a small settlement called Lepeuli where Mr. Johnson had an outpost station meeting house. Our course was now somewhat inland 2 or 3 miles from the sea, and the land gently level & covered with grass. This region is chiefly occupied by the heirs of Mr. Dudoit, the French Consul, though they range over a wide territory to which he has no claim whatever." So, it looks like Mr. Dudoit is the French Consul who had a outpost there and Mr. Chester Lyman, as he proceeded all the way through to Hanalei which you will see down here, traverse the road that was somewhat inland. Whether it is two (2) to three (3) miles or not, who knows how he calculated it, but it seemed to be more inland. The maps and historical text as well as *kama'aina* testimony, there are disputes actually of where it is and that is why when you get to the issue of trying to locate not just the existence, but the actual location of the trail. It is an in-depth legal analysis that would have to be done based on significant research. I think one of the important examples to look at how to possibly resolve this issue is what the Moloa'a Bay Ranch example was and if you look through the history of land tenure in Hawai'i, it is quite complex. Everyone

thinks The Great Mahele was one action. But it was a series of actions which King Kamehameha III started to create the Board of Land Commissioners and Land Commission to issues property out to try to trend towards a more western notion of property rights. There are several actions following that in 1848 and 1850, sort of the conclusion through the Mahele through the Kuleana Act, started to delve out property. When the territory was created through the Land Act in 1895, that is when the government sort of took over the administrative responsibility of the public lands as well as the crown lands when they sort of merged together. Then in 1900, when we had the Organic Act which basically formalized it as a Territory of the United States, then it sort of moved that administration of the lands again to the Territory, and then in 1921 we had the Hawaiian Homes Commission Act which basically established some roles of creating land tenure for Native Hawaiians, and then in 1959, we became a State. Then we started incorporating the land use laws that now apply, starting at that timeframe. So, this example was actually a good okay. Moloa'a Hui was a *hui* of, from what I understand, originally Hawaiians that own the property and then there was a partition action do divvy up the property. In that case, and I will get you this document. I thought you would be able to read it. Basically, what happened in this is the State identified historic trail and where it existed at the time, they decided to locate the trail there and the State launched a claim and where the trail was not located, the State decided to locate the trail. So, they decided where the *ala loa* was to be, not that it was on the exact historic location, but the State has the ability to locate the trail where it believed it may be or believed it once was. So, the State can negotiate with the landowner to identify and locate a trail that is referred to as the *ala loa* and that is what they did in the Moloa'a Bay Ranch example.

So, we get to the issue of what is Quiet Title and a friend of mine actually wrote a really good primer on Quiet Title and she is on grant with the Office of Hawaiian Affairs (OHA) and the University of Hawai'i (UH) and it is available online now. It is a 2013 edition and there is the site to it right there, Stephanie Chen. If you Google it, you will pick it up pretty quickly. Basically, to get a Quiet Title Action it can be launched under HRS Section 669 which governs the Quiet Title Actions. Any person who has an interest in the land or claims to have an interest at odds with the person filing the action can be launched into the claim. So, in a Quiet Title Action, as in any lawsuit, the individual entity who files the action is a plaintiff and the plaintiff then brings the suit against a defendant. Basically, what you look at in a Quiet Title Action is an action to get a court determination as to legal ownership of the property. If there is a cloud or negotiation of the claim that is not noted on deed and someone wants to raise that claim in court, you can file this type of action to resolve that claim. But you to file an interest in the property.

In summary, the State currently has no intention of locating the historic trail as we learned from the letter. If the County accepts the easement, it potentially will become an interested party in the area and we probably would be joined in as a party in any type of court action. I talked with the Attorney General's Office and they understand that if we come in and be a party, that we could try to work something out, we can negotiate the intersection of where the so-called historic trail may be in the pending litigation if there is any litigation. At the end of the day, you have to look at the purpose of what we are doing here. The purpose is to establish a trail for public use through the easement. If you look at what the State's intention to do is to locate that historic trail. It is to locate a trail for public use as an old historical trail. So, where the trail will intersect, even if the State wins its case as to location of the Ala Loa Trail, where our – let me go back here. I will just use the

overview map. Sorry about that. Anyway, once I get to the map, here it is. So, if the trail *ala loa* is laid out by the State here, there would be an intersection there and where our County easement ends, there will be a State lot of record based on the historic trail and then people would still be able to access over that portion of the public trail which is now State, and then out access would continue on where the State did not lay a claim. So, to stop this acceptance of a grant of property from a landowner lease because the State may be filing a claim, which the State says it will not file a claim, I do not see rationale because technically it is for public use and the trail will continue on. I know there has been some discussion about why the trail is so long, but the State law allows us to issue the trail from the public road and these roads are going to remain private. The public road will be Ko'olau Road, so the parking lot will be here and it is a long walk. Some people prefer to have short distances to the beach, which they will have access on the short distances which goes all the up to about three hundred (300) yards away from the beach on the eastern portion of Lepeuli. They can get a direct route here, but not everybody enjoys getting to a direct route, some like the long road, some people could take a nice jaunt walk down at the beach. Myself as well as one member of Council Services Staff walked it to see what the length would be in terms of timing the mile. We walked it while snapping those photos in about twenty (20) minutes so it is a nice gentle slope down. Coming back up is a little hot, but it is still a nice gentle slope down. Any questions?

Chair Nakamura: Let us get the lights back on and we have questions for you, Ian. Councilmember Rapozo.

Mr. Rapozo: Thank you, Ian, for that presentation. We asked the rationale. I guess for me, the rationale is twofold. Number one is preservation of an historical *ala loa*. I want to make sure that, in fact, that *ala loa* is defined. The second rationale is, it is not just about getting a possible trail, it is about getting the best possible trail for the users, not what is most convenient for the developer. I think that is my rationale for asking the questions. I think you answered some of these as I wrote these questions. Have we determined exactly where the *ala loa* is located? The answer is no. You referenced it as the alleged *ala loa*, almost as if it is an allegation that it is an *ala loa*, and it may not be true.

Mr. Jung: Well, I have to temper my words because I do not want to be claimed for a slander of title claim (inaudible).

Mr. Rapozo: I think what you say alleged it means that it may or may not be.

Mr. Jung: Exactly.

Mr. Rapozo: I guess the question is would it not be prudent for us to determine where that *ala loa* is before we do this type of agreement, this type of legal document and really, whose responsibility is it to define *ala loa*?

Mr. Jung: To answer that question, I think you certainly have the option to wait. I mean, this is basically a Grant of Easement. You folks are the ones who make the call on whether to accept it or not. So, you folks do not have to accept it if you do not want to.

Mr. Rapozo: I guess the question was would it not be prudent for us to determine where that *ala loa* is before it results in action of a lawsuit down the road?

Mr. Jung: I think prudence is certainly in the eye of the beholder because from what we hear from the State that they are not going to have...

Mr. Rapozo: I have not seen the letter, I apologize, but I met with the Governor last week. In fact, Mr. Kagawa and I, and we did bring this up. As we were leaving his office we ran into Mr. Aila and I guess, I did not get that from him. So, I am surprised to see that letter. He probably signed it, but I know he was en route to get into the Governor's Office so maybe he was rushing. But, that is news to me.

Mr. Jung: I think at the end of the day though, if the *ala loa* is identified which if the State does it great. But at the end of the day, the *ala loa* will be for public use and our Grant of Easement will be for public use. So, where it intersects, it is not like we are going put a bike path where you layout concrete. It will just be an unimproved trail, grass eventually turning into a dirt canyon where you walk through. A normal trail where you see dirt canyons. If Council approves this document and we get to the point of lining out this trail, when we go through the Conservation District portion, we are going to have to go through a permit which will trigger 6E, which is the Historic Preservation Review Process and then we will go through the process and submit comments for State in where to line out the trail in the Conservation District. So, when we get there, there will be comments from the State and possibly the Attorney General's Office. I just had Eddie make a copy of the DLNR comments from a prior consolidation action which DLNR had issues locating the trail on the western portion of the property line because of species that exist out there, be it albatross as well as monk seals. They did not prefer it on the western side, they suggested it should be on the eastern portion. Either way, whether it is on the eastern or western portion, it would still have the intersection with the *ala loa* should there is a Quiet Title Action. But as of right now, there is no Quiet Title Action.

Mr. Rapozo: Right, there is no Quiet Title Action. I have more questions.

Chair Nakamura: Councilmember Kagawa and then Councilmember Yukimura.

Mr. Kagawa: Thank you, Ian, for the presentation. If I am looking at the map, you said to the western side of the trail that we are talking about.

Mr. Jung: The trail is on the eastern side.

Mr. Kagawa: Yes, so it is right...

Mr. Jung: This is the western side.

Mr. Kagawa: So, the map is flipped around?

Mr. Jung: The map faces north, so here is west.

Mr. Kagawa:
where the vehicles could go closer?

So, you said that there was a short access

Mr. Jung:
Lot 4 which is about right here. You can see the edge of the white sand there.

Mr. Kagawa:
one (1) mile walk?

What is the distance between that and the

Mr. Jung:
four hundred (400) yards maybe.

I would guess about three hundred (300) to

Mr. Kagawa:
It is that close?

Mr. Jung:
Yes, it is real close.

Mr. Kagawa:
My concern is that for fishermen or divers who have to carry gear, one (1) mile is – they are not going to go a mile with the gear to go fishing. Three hundred (300) yards does not seem that bad. I mean I do not know what Tim folks wanted and I am interested to hear how satisfied they are with this easement. Is that the best we can do, is a mile away? There is a nice parking lot and I am really impressive with that driveway. A nice parking lot, but it is a mile away. It seems quite far. I know everybody loves a walk, but I envision beach access to be for all people, older people want to go back and enjoy where they used to go and a mile is quite far for an eighty (80), ninety (90) year old person to go down and enjoy, too. Is that the best we could do?

Mr. Jung:
I will pull it back to the original map. I guess we can use this map. The 46-4, our enabling legislation, allows us to basically come off the public road. So, we are kind of stuck with the law because all of these roads will remain private. They are not going to dedicate them to the County. They have the option to dedicate them to the County and they are not going to so they are going to remain private. Here is the Ko'olau Road, so public roads start here. Now, I was not in the discussion in 2008 where it lined it out this way, but from what I understand, there was a discussion that there is a current access and the Subdivision Code allows for if alternative access you can look at other options. Here we have an alternative access that actually allows for a more direct route to the same beach. I understand the point and it is a legitimate point.

Mr. Kagawa:
for our future, our *keiki*, is to have as much as we can and not just to say we have one access that is three hundred (300) yards away. We want to get as much as we can, as close as we can so that we can go fish and do things that we used do before. To just say that we have one (1) and any other access can be a mile away is acceptable, to me, we are not fighting hard enough for our people. That is just my opinion, I guess. *Mahalo*.

Chair Nakamura:
Councilmember Bynum.

Councilmember Yukimura and then

Ms. Yukimura:
You really laid out both the law and the topography, if you will, so we can understand what we are talking about. My understanding is that if we did not have the issue of the *ala loa* then we would be looking at this access document in terms of

whether it meets a sufficiency of access, I mean we do not want it to go over a cliff making it literally impossible for people to actually traverse as we have done in the past sometimes and we want to look at the issues of parking and distance and so forth, right? When you talk about DLNR's concerns about species, what I hear is that they are having to deal with this issue of dual mission, which is they want access to resources but they have to also protect the resource. Public access is a double-edged sword especially if you think of a million tourists a year on this island who would have access as well as local fishermen, and local people who have used the trail for a long time. I can understand the hesitation because they are having to sort through all of these issues and it seems to me like with that one block where they reserved their claim, that was foisted upon them. They had to make a decision. There was already an ongoing action and they had to respond so they kept their option of claiming, is that right?

Mr. Jung:

That is correct, yes.

Ms. Yukimura: They did not cement or fully vest or establish their claim, but they reserved the right to come in and say we have a claim here and to vest it, if you will, at some point in specifics. If they are dealing with that issue, we do not know when they will deal with this whole issue of going through several parcels, if you will so our choice now is to either accept the proposal from Falko Partners or wait until...

Mr. Jung: Let me just qualify that. It was a proposal that was discussed with DLNR and then eventually approved by the Planning Commission when they laid out the easement on the final map.

Ms. Yukimura:

Which was a proposal?

Mr. Jung: Where the proposed easement was and they lined out the easement on the final subdivision map.

Ms. Yukimura: When Falko came before the Planning Commission for subdivision of the land, there was a provision for access?

Mr. Jung:

Access, correct.

Ms. Yukimura: You and an Attorney for Falko have been actually laying out the metes and bounds.

Mr. Jung: Well, it was not me at the time because I was not with the County. This occurred in 2008. I do not know if it was a County Attorney, Deputy County Attorney, or a Planner. You can maybe ask the applicant that type of question.

Ms. Yukimura: What are we doing here? But that was never accepted by the Council for metes and bounds?

Mr. Jung: The Council would be the final act of approving the grant of easement to basically accept the interest in real property.

Ms. Yukimura:

Right.

Mr. Jung: So, you folks would effectively have the final say despite the final maps and the final plan having a notated easement on there.

Ms. Yukimura: If we do not accept it?

Mr. Jung: If you do not accept it, then we do not have it. It will not be recorded and there would be no right to access that and the maps would probably have to be recertified to eliminate that.

Ms. Yukimura: We do not have a chance to go back and say we want it later?

Mr. Jung: I do not think that has ever happened. It is something that we could explore if that is the option of the Council.

Ms. Yukimura: Anyway, what I think you were showing about the Quiet Title Action is that even if we accept that the access being proposed that is before us, the deed I guess, today, the Quiet Title Action will allow us to intervene or be part of the proceeding when the *ala loa* is determined?

Mr. Jung: Right. If we accept the easement then we have an interest in the real property. A servient easement, we would be the servient easement holder. We would have an interest to at least raise a claim and we would probably have to be a defendant made if the State were ever to file something. I talked to the Attorney General's about it and they have no problem with us because they recognize that the intent is for public access, whether it is lateral through the *ala loa*, or vertical to the ocean resource. The public access will exist.

Ms. Yukimura: So, the State and County have a common interest in public access and in the Quiet Title Action which we are not closing as an option, especially if we accept this deed before us and we establish that we have a legal land interest that is related to the *ala loa*, then we would still be able to negotiate the intersection or whatever?

Mr. Jung: Correct, yes. The intersection would be what it is. The parcel would effectively be de facto subdivided by this Quiet Title Action and the State would claim its lot as an historic trail and then where the bisect of the trail occurs, at the south end of the property line where our easement ends, it would end. At the north end of our property line, of the State *ala loa* property line if there is one, would be where our access continues on. Let me try and break that down.

Ms. Yukimura: Right, and our access goes all the way to the beach or the high-watermark so we will intersect one way or the other?

Mr. Jung: Correct.

Chair Nakamura: Councilmember Yukimura, can you ask another question and then we will go to Councilmember Bynum and we do another round again.

Ms. Yukimura: We do not have the power to determine the *ala loa*?

Mr. Jung: No.

Ms. Yukimura: That is in State?

Mr. Jung: Correct. Theoretically, you have the option to go in and try and condemn it, under HRS 115-15 you have the option to do that.

Ms. Yukimura: If you condemn, you have to pay?

Mr. Jung: Exactly.

Ms. Yukimura: Alright, thank you.

Chair Nakamura: Councilmember Bynum.

Mr. Bynum: Thank you, Ian, for the presentation. I apologize for being a few minutes late. So, if I ask something that you covered, I apologize. You just outlined the Council's options, take it or leave it, right? Take the easement or say no and then we do not have any public access. So, this is the part I may have missed, the Planning Commission approved this easement that is a mile long?

Mr. Jung: Well, let me try and walk you through the subdivision action. The map gets proposed as an application. The map goes through a three hundred sixty (360) degree and tentative approval is issued. This is all a public process, so people can come and testify and people can come and come before the Planning Commission, Subdivision Committee to say no, we do not think it should be here or there, right? At tentative approval they will line it out on the map, where the proposed access because there is a condition for access because it is a subdivision of six (6) lots or more. That condition is tempered with the fact it has to start where from a public street and in this case the public street or highway is Ko'olau Road. From what I understand, this could be a question for the applicant, they are not going to dedicate those streets in there. I believe the street will go through basically here. So, even if the main street would go through here, it would still be a distance there. At final map approval, after the Planning Department works with the applicant and people assert an interest where to locate the easement, the Planning Commission will approve the final map. On the final map there will be have a description of where this easement will be and in this case, the description was proposed here.

Mr. Bynum: So, has that happened?

Mr. Jung: Yes, the final map is approved and you can see where the easement was lined out in the final map.

Mr. Bynum: Could the Planning Commission have said no, this is not good enough, we need a better access? Could this he have done that? Could they have the authority?

Mr. Jung: Yes, and I think it has happened before, but in this case, that was not the issue. That was not the call.

Mr. Bynum: The Council, even though we are accepting the easement, we have to accept it as-is or not?

Mr. Jung: I mean, you could probably go back and ask. But what the developer – I mean we have to recertify maps and go through the process.

Mr. Bynum: I do not want to take too much time, so I will ask quicker questions.

Mr. Jung: We would have to analyze that.

Mr. Bynum: I understand the *ala loa* issues. First, I want to defend you in using the word “alleged.” You are an Attorney and these things are in dispute, but I think all of us know that an *ala loa* did exist and that it is in best interest of our community to pursue it. The State was actively pursuing it in the 1980’s, correct?

Mr. Jung: I do not know about in the 1980’s.

Mr. Bynum: The State has periodically pursued that and they have not given up their claim to eventually someday identifying and opening the *ala loa*, correct?

Mr. Jung: I do not want to speak for the State. I mean, you could ask the State.

Mr. Bynum: That letter, I think I have read, that you presented and it does not say that the State is giving up their claim. It says that they are not currently engaging in efforts, but they have in the past, correct?

Mr. Jung: They have reserved claims to it.

Mr. Bynum: I just want to say in the long run, and this whole issue of lateral access along the coastline is an important issue for many years in this County, and we have negotiated lots of accesses. This is the worst I have ever seen. I know that they have to dedicate from the public road, but the first three-quarters (3/4) could be a road access to a parking lot. It could be that way and meet the requirements of the law?

Mr. Jung: It could, but there would be the cost of establishing that road which would be borne by the County. If that is the route you folks want to go to pay for a road down there, you could look at doing that.

Mr. Bynum: I do not think when we negotiated with other entities about lateral access like the resort that is proposed at Pākālā or even Keālia Kai where the negotiation resulted in land donation to the County and lateral access. So, here we are not even attempting to get lateral access which has been historically, our negotiations with land owners. Right in front of Coconut Marketplace, the County has a one hundred (100) foot beach reserve laterally. We have a Lateral Access Bill sitting pending here, pending further action. I am very disappointed that there is no lateral access at all and what other beach access can you think of that we negotiated through a subdivision that was a mile long? I mean, every developer that I have worked with has been more that we have engaged with, has been more willing to accommodate the public than this. The issue of whether they dedicate the streets or not is will also allow them to gate those streets under our laws, is that correct?

Mr. Jung: That would be a question for the Department of Planning in terms of gated communities.

Mr. Bynum: Under our current law, if the subdivider choose to and built the roads to County standards, we would have to accept them from him, right?

Mr. Jung: Yes, if they wish to dedicate, but they are not obligated to dedicate.

Mr. Bynum: Most owners wish to dedicate because they do not want the long-term maintenance unless they want to keep the privacy and they want to keep the public off a portion of our island.

Mr. Jung: I think what you need to recognize is the distinction between developments. I think you are attempting to generalize a resort development with an agricultural subdivision.

Mr. Bynum: Keālia Kai was an agricultural subdivision, correct?

Mr. Jung: Yes, and if you look at the access there, that is probably a half mile access.

Mr. Bynum: And lateral access, the entire length of the property.

Mr. Jung: Through the bike path, I am assuming you are talking about. I think if you truly want to understand this, I think we would have to get into a discussion of the rough proportionality of central nexus and examination. We can do that if you folks want to go that route in terms of what...but just bear in mind, this exaction has been already imposed. So, to go back, we would have to chart that path. If you folks want to go that route, we can certainly look at it. It is up to you folks.

Mr. Bynum: I am uncomfortable that the decision making body of the Council is given, in essence, no input on this whole issue and then told to take it or leave it. I am not familiar of any other circumstance like this that has happened in an agriculture subdivision or a resort subdivision where the County was only able to negotiate what I consider a legal minimum. Most of the people we have engaged with want to be members of the community and provide that access. I think we should have been tougher. That would be my message to the Planning Commission. I think we need to look at how we have a circumstance where such an important issue is decided at the planning lay level. It should come where we have the resources to examine that and really see if it is in the public interest in the long run. But this is...

Chair Nakamura: Do you have another question?

Mr. Bynum: I am done for now.

Chair Nakamura: Councilmember Hooser, you are not a member of the Committee, but feel free to ask your question.

Mr. Hooser: Thank you, Chair. As a non-member, I appreciate the opportunity to ask questions. Keālia Kai actually is a good example I think and if I remember correctly, it was brought to the Council and there were conditions on the easement that the Council found you unacceptable and later those conditions were removed. There was a lateral easement that was many years before the bike path, that was a requirement of the subdivision.

Mr. Jung: I think that was an old cane road, right?
Was that the State old cane road? I believe that was an old State cane road.

Mr. Hooser: Right, but it was an exaction, if you would?

Mr. Jung: From the State?

Mr. Hooser: The beach area was. No, from the owner. The owners had conditions with the gate, with no night time access, and all of these other conditions, private security guards and that kind of thing. It came to the and at Council and at the end of the day, the conditions were changed. I am not clear why we do not have authority whatsoever.

Mr. Jung: You certainly have authority to tinker with the document if there are things that you want in there and conditions, but just bear in mind that we have a grantor and a grantee. The County is the grantee. The developer is the grantor. If they do not agree to the conditions, it is a mutual agreement. If they do not agree to those conditions that you propose, then it becomes a dispute. If you folks have amendments to the document, you can certainly do amendments to the document. I am talking about the location. If you want to change the location, then we can do that and then start. But we would have to go back and recertify the maps and then enter into discussions with the applicant as to whether they are willing to give up access.

Mr. Hooser: The Council has the authority to do that is what you just said?

Mr. Jung: Yes.

Mr. Hooser: The subdivision would not proceed until that was reconciled?

Mr. Jung: No, the subdivision has been approved. So, this is fulfilling a condition of the subdivision. It is basically a land use condition.

Mr. Hooser: Right. What leverage would the County have to negotiate with the landowner?

Mr. Jung: Well, I do not think I want to disclose those leverages right now if we are going to go into negotiations.

Mr. Hooser: When it is done, is it part of the subdivision. It is like if you want the subdivision, you have to give us access, right? So, that is the main leverage. How wide is the easement?

Mr. Jung: The Subdivision Code calls for a ten (10) foot standard access easement.

Mr. Hooser: And you said forty (40) feet of parking?

Mr. Jung: Well, that you be the forty (40) because you need a turning radius for the cars to turn around. So, they have given over forty (40) foot width and I forget what the length is, but a forty (40) foot width.

Mr. Hooser: To park cars or to turn around?

Mr. Jung: To park cars.

Mr. Hooser: How many cars can you park?

Mr. Jung: That is a good question. I do not know that answer.

Mr. Hooser: I think that would be very important to know and that would be part of the tinkering, if you would, because we have to plan for the future, as you know. So, if it only holds minimal cars, so we can get that information from you, right?

Mr. Jung: Yes. I will have to work with the engineer. It is not like when you have a commercial development where you line out the number of stalls that you need for per square footage of space. I would have to probably work with the Engineer's Office to see how we would identify how many cars could be parked in there.

Mr. Hooser: I think the Keālia Kai example and others are specific numbers of parking spaces that are part of the agreement. So, yes, it would be important to know that. Even though the County may or may not want to pay for a roadway, it seems to make sense again, planning for the future, the County could secure the land in case the County at some point wanted to approve a roadway?

Mr. Jung: Sure.

Mr. Hooser: I think it is a reasonable request to ask.

Mr. Jung: I think in this particular case because literally half a mile away there is a long access road that goes down there, that a long road would not be necessarily required because there is already one that exists half a mile away to the same beach.

Mr. Hooser: What many of us are trying to look out for the best interest of the community. So, more is better I think in this particular situation. Are there any rules, any Codes or any gates, any security on this easement? Is it open twenty-four hours (24), seven (7) day a week?

Mr. Jung: It would be open twenty-four (24) hours, seven (7) days a week, yes.

Mr. Hooser: Who is responsibility for the maintenance?

Mr. Jung: There are dual requirements. So, if we wanted to go in and do maintenance, we could. If they wanted to go and do maintenance, they could.

Mr. Hooser: No one is required to do maintenance?

Mr. Jung: No one is required to do maintenance.

Mr. Hooser: Thank you.

Chair Nakamura: Councilmember Rapozo and then
Councilmember Yukimura

Mr. Rapozo: I just want to get clarification on the letter that was sent out. Councilmember Yukimura provided a copy of the letter that we sent out and it is referencing a September 12, 2012 letter.

Mr. Jung: Right.

Mr. Rapozo: Was that pertaining to this project?

Mr. Jung: No, and that is an important clarification. I am glad you said that because actually that was with regard to the Wai'oli property.

Mr. Rapozo: Right. So, not this one?

Mr. Jung: Not this one. But in the discussions with the Attorney General, the *ala loa* if one exists and where it can be located on these two (2) affected parcels, would continue on.

Mr. Rapozo: So, we did not consult with the Attorney General or the DLNR with pertaining to this agreement, in writing?

Mr. Jung: Not in writing.

Mr. Rapozo: Did we consult with the Office of Hawaiian Affairs (OHA) or State Historic Preservation Division (SHPD)?

Mr. Jung: No. The historic process is a process in and of itself that if you propose and application for permits, then it triggers. If you want to do a development then it triggers. If you folks do approve this because the easement will go in through the Conservation District, we will have to go in and apply for a Conservation District Use Permit to get the location of the trail.

Mr. Rapozo: I am not sure if you got a copy. Well, this went to the Planning Committee so I am not sure if you got this or not. This was from Hope Kallai and we can provide this to you. She references OHA's response to the Moloa'a Trail relocation in 2008. I will just read it because I think it applies throughout the *ala loa*. It says OHA has specific concerns regarding the project again, not this project, but the project's impact on area trails particularly the *ala loa*. Moreover there seems to be disagreement between the applicant and community regarding the exact location of the *ala loa* and the Ko'olau Road, that applies to this matter. We request that State officials and the applicant consult with the community and OHA to discuss appropriate measures to mitigate the

impacts this project will have on cultural site and traditional and customary native Hawaiian practices. So, I know that you mentioned earlier that you were not an expert in I believe it was the *ala loa*, inland versus coastal. I would think OHA would have some insight and maybe as far as the importance or significance of OHA. Again, I have not seen the response from the DLNR, but I would think that we would want to consult with OHA. I believe that the determination of the *ala loa* is vital. I think it is important. I think that should be done number 1 and if State is going to come back and say we are not interested, then the State has to deal with the people or whoever is making these decisions. In my opinion the *ala loa* is critical to this island. It has to be defined and it has not been done. Quiet Titles and all of these civil litigation opportunities exist, but I think just to preserve the culture of this island, the *ala loa* is a very important component of that. I mean if you read in the history books they all mention the *ala loa* and I think that *ala loa* should be preserved forever and I am afraid that when we do things like this, that we threaten that *ala loa*, that very important component of this island's history. I asked the questions. I do not think it is take it or leave it. I think we, as a body, have the duty to really investigate this as much as possible. I hope you can appreciate that. The only other question is on the eastern access that is there today, is that accessibility by the *kupuna*?

Mr. Jung: Well, for trails and I have consulted with Native Hawaiian Legal Corporation on this, David Franco, who have I become friends with other litigation. He referenced an exceptions to the Americans with Disabilities Act (ADA) requirements for historical trails and unmaintained trails. So, whether or not it is accessible or not, it probably would not be, and it depends.

Mr. Rapozo: Oh, it is not. The last time I went there, it is not accessible to the *kupuna*. I am not talking about ADA, I am not talking about a *kupuna* with a disability. I am talking about a seventy-five (75) year old, eight (80) year old that wants to go down there to go fishing cannot get down there with eastern access. They cannot, it is not accessible.

Mr. Jung: Are you suggesting we do a roadway down there to make access?

Mr. Rapozo: I am suggesting that when we look at opportunities, like Mr. Kagawa said, I think he hit it on the head. When we have opportunities to force developers to provide traditional access now, access that it the *kupuna* once had, we should take that opportunity to may be make it happen and that is what I am saying. Whether it is the Planning Commission or the County Council or whatever opportunity we have. Now just because of the Planning Commission decided that this was sufficient, that is one body. But the final say is here and whether we got to go back to them, like they did with Keālia Kai. If they want to play hard ball, let them play hard ball. If the develop will say no, screw you, screw the *kupuna*, that is their opportunity as well. But I think that the *ala loa*, number one, in my opinion, the *ala loa* needs to be defined and I am very curious to see the response from DLNR because again, in my very short discussion with Mr. Aila I did not feel that. I think it is important that we consult with OHA and we consult with the community because I do not think I am that alone, that the *ala loa* is a critical component that we should definitely try to preserve.

Chair Nakamura: Councilmember Yukimura and then Councilmember Bynum.

Ms. Yukimura: If we choose not to accept this *mauka/makai* access, the one before us in the deed starting from the public highway, we either just leave it undefined and unsecured or we try to get another but *mauka/makai* access? If we change the basic location of the one before us, do we not have to go back to the Planning Commission?

Mr. Jung: If you are not affecting a lot line, then you can recertify the maps to affect the easement, but it will be the Chair of the Commission that would modify the easement because the easement is not a lot line. So, you are not affecting the lot and the Chair would have to go back. The thing is that we have a separation of powers issue because the final approval was done by the Commission to relocate that trail. I would have to analyze how we could deal with that structurally, systemically...

Ms. Yukimura: My guess is you are going to have to go back to the Planning Commission.

Mr. Jung: Right, that is what I am thinking. I have not thoroughly thought it through yet.

Ms. Yukimura: If we have to go back to the Planning Commission, if the Council negotiates and if the developer or landowner agrees, then go back to the Planning Commission to get approval?

Mr. Jung: That is what I would have to take a look at. In terms of just organization because it is not an application anymore. It is not even a modification because you are not affecting the lot line. I have to think about how to approach that. I know that this just up for discussion today, right? So, there is no action on it. It is going to be the next meeting?

Ms. Yukimura: Right. Then, is there authority for the County to require a lateral access?

Mr. Jung: I would be happy to discussion with you guys the Koontz decision, but I think it should take place in Executive Session because the United States Supreme Court just came out with a new analysis on how to deal with the essential nexus rough proportionality test that we are establishing in Noland Doland and how we approach land grabs as well as in lieu fees. So, you folks want to do that discussion, we certainly can have the discussion. But that would have to be in Executive Session.

Ms. Yukimura: But that is an issue in this case?

Mr. Jung: Oh, certainly.

Ms. Yukimura: It is an issue whether we even have the power to require lateral access?

Mr. Jung: Correct.

Ms. Yukimura: But we clearly have the authorization to require the *mauka/makai* access?

Mr. Jung: Correct, that is a specific condition.

Ms. Yukimura: Alright, thank you.

ALFRED B. CASTILLO, JR., County Attorney: Chair Nakamura.

Chair Nakamura: Yes.

Mr. Castillo: Can I make a comment, please?

Chair Nakamura: Yes.

Mr. Castillo: For the record, Al Castillo, County Attorney. I just want to be sure that we have an open discussion of what direction this body wants us to go because we are your legal team. What I am hearing you are unloading on Ian Jung, but we have the same concerns as you all do and what I am hearing from Councilmember Rapozo is...

Chair Nakamura: Mr. Castillo.

Mr. Castillo: Yes.

Chair Nakamura: I think we are all in the fact-finding stage right now. I really do not think we, as a group, have come together as a Committee to set that direction. I am hoping that after this line of questioning and after we receive public testimony and when we come back into our Committee discussion, we will be clear as to what direction we are moving. I hope you do not take the individual questions as a group decision that we are moving in one direction because we have not had that discussion yet.

Mr. Castillo: I just wanted to get that straight.

Chair Nakamura: This is deliberative right now and I think that is the purpose of Committee Meetings is to ask those hard questions. I think Mr. Jung is doing a very good job in answering them.

Mr. Castillo: Good. I am glad. At the end of the day, like he says, I want to be sure that we have...

Chair Nakamura: That will be our next phase after the public testimony. We will have that discussion and I think as a Committee, decide how we want to proceed, but we are not there yet.

Mr. Castillo: Thank you.

Chair Nakamura: Thank you. Councilmember Yukimura, please continue.

Ms. Yukimura: Chair, I would like to ask that we schedule an Executive Session on this legal issue of Koontz.

Mr. Jung: Sure.

Chair Nakamura: Thank you, I think that would be appropriate. Councilmember Bynum, Councilmember Hooser, and then Councilmember Kagawa.

Mr. Bynum: On the existing access, there is actually one (1) trail and it splits into two (2). We have two (2) easements down there, correct?

Mr. Jung: Not affecting this particular parcel, but we are talking about the Wai'oli parcel.

Mr. Bynum: No, the existing one.

Mr. Jung: Correct.

Mr. Bynum: The Wai'oli parcel?

Mr. Jung: Yes.

Mr. Bynum: So, what happened in 2010 is the County had not maintained its easement and so the public was going straight down the hill not on the switchback, correct?

Mr. Jung: I was not around when there was any maintenance issues out there.

Mr. Bynum: What the County accepted in 2010 was this portion that the people were using, most people were going to the left, that trail is now closed. The ones going straight down, were trespassing in essence, going across private property because the County had not maintained our existing easements it had been blocked by the other land owner and I voted to accept that trail because we will have two (2) options. I am also very concerned about the County maintaining its accesses because of this issue of accessibility. I agree that we are not going to have ADA full blown access on many trails, but it still means we want to have a trail that is designed without steep falls and that is what is happening now. The *kupuna*, me, I am going to have a hard time. Three (3) ears ago, five (5) years ago I would have been find, but I have some medical issues. I cannot make it down that trail anymore and so that accessibility issue is there.

Mr. Jung: Right.

Mr. Bynum: Does the County have concerns that the safest accessible trail that we own is not open. Is that a problem?

Mr. Jung: From what I understand, someone went out and cleared it and I am talking with the Department of Public Works right now to at least try and identify resource allocations on how we can look at creating some kind of maintenance to do these easements. Remember, that easement is not alone out. There is a multitude of easements on Kaua'i and you all know Kaua'i. Kaua'i is a rugged County. I mean, there is going to be steep elements to specific beaches like Kauapea.

Mr. Bynum: Right, and we are not going to eliminate that, we are not trying to.

Mr. Jung: Exactly. So, what you have to bear in mind is that when it comes down to the landscape of Kaua'i, there are going to be difficult places to traverse and if the *kupuna* cannot get there, we can do our best to try and make it the easiest. But we are trying to identify a way to at least allocate

resources to look at the trails and the easements to see how we can best approach because it is island wide, it is not just Lepeuli. There are several other areas where it rains and the grass grows, the Hale Koa grows, things grow. We are going to try to work on resource allocation to at least identify these problems.

Mr. Bynum: I am certain that is a challenge. But my question is if we have identified a trail that is safer than the current one and we do not maintain it, is that not a problem for the County?

Mr. Jung: Liability is always an issue.

Mr. Bynum: I did not say that word.

Mr. Jung: But that is what you were suggesting.

Mr. Bynum: If anybody goes straight down that trail, gets hurt, and finds out there was an alternative that the County has chosen now, when it was clearly identified in 2010 as an issue, not to bring it back to usable defined area and that was on the record in 2010. You can read it. The Council wanted both trails. We were asked to accept this one that was being used, but we wanted them both maintained and you are right, it is an issue all over. But this one has a lot of public attention, a lot of public use, and it is an area where I think we have been hanging out there since 2010. I just want to know if you agree.

Mr. Jung: I do not agree because I think there is a difference of opinion on what is safe or not.

Mr. Bynum: I appreciate that. Thank you.

Chair Nakamura: Councilmember Hooser, then
Councilmember Kagawa.

Mr. Hooser: Just real briefly and I hope you do not think we are piling on.

Mr. Jung: I have had it worst.

Mr. Hooser: I should hope. This is nothing and you are doing a great job responding. I appreciate that. The thing that kind of puzzles me and it is a legal issue or question. I do not think it is Executive Session stuff. So, a subdivision has a requirement for public access easement like this, but they are allowed to subdivide before the condition is satisfied? To me, that is an inherent problem, but that is the situation right now?

Mr. Jung: Well, what happened was the document was submitted up and it was actually submitted up to the Council in 2010. There was an error that the document did not actually go through the Conservation District because of issues the State had. Thankfully Peter Morimoto caught it, that is did not go all the way to the shoreline so we were able to go back and work with the developer and get it. It just took some time. We were inundated and we were working through those right now to get the map.

Mr. Hooser: But the law allows the subdivision to occur before the condition of the subdivision easement is satisfied?

Mr. Jung: They submitted a proposed Grant of Easement. Remember, if you folks are in the situation where you do not want to accept the easement, then you cannot.

Mr. Hooser: The subdivision still occurs?

Mr. Jung: Right.

Mr. Hooser: Right, so that needs to be changed in the Ordinance? We could theoretically amend the Subdivision Ordinance to say that final subdivision shall not occur until whatever conditions have been satisfied prior, whether it is affordable housing or whether it is easement. It is particularly this kind of easement so we would not be in this situation again?

Mr. Jung: I would not recommend a change because issues pop up where some community members do not want it and some do not want it, Council plays the politics of trying to look at which community members are saying what, and then you get to the issue of holding up a subdivision when we have timelines that attach to subdivision actions. I think as long as they submit the proposed Grant of Easement...

Mr. Hooser: I will pile on now. Thank you for your opinion on that.

Mr. Jung: Sure.

Mr. Hooser: But that is an option that the Council could take? If we wanted to amend the Subdivision Ordinance to say subdivisions shall not be final until public easement accesses are satisfied, that is something that we can do with the Subdivision Ordinance?

Mr. Jung: We could look at that, sure. We can work with you folks on that.

Mr. Hooser: Thank you.

Chair Nakamura: Councilmember Kagawa, do you have another question?

Mr. Kagawa: No, I am done.

Chair Nakamura: Any others? I have some questions. Are there any plans for fencing around the proposed easement?

Mr. Jung: Yes, and that will all come in depending on what you folks approve because the developer has asserted that they would be willing – well, they are going to do a fence and also do graveling in the parking lot, from what I understand, and also line up the fence line on both sides of the property.

Chair Nakamura: Both sides?

Mr. Jung: Yes.

Chair Nakamura: Ian, can you find out about the number of parking stalls?

Mr. Jung: Yes, I have that written down.

Chair Nakamura: That is from Councilmember Hooser and I have the same question.

Mr. Jung: Do you folks have a sense of how many parking stalls you do want, in case we have to modify?

Mr. Hooser: One hundred (100).

Mr. Jung: One hundred (100)? Is that like the five hundred (500) foot?

Mr. Hooser: Sorry, Chair. I apologize.

Chair Nakamura: I would be curious to see if the Open Space Commission has any guidelines that they are currently using and if the Planning Department has any guidelines that they are using currently for public easement and access.

Mr. Jung: This matter was brought up before the Open Space Commission.

Chair Nakamura: Did they not specify?

Mr. Jung: No.

Chair Nakamura: The number of stalls?

Mr. Jung: No.

Chair Nakamura: Will there be signage in any way to notify the public that this easement exists?

Mr. Jung: Well, the Open Space Commission is actually working on a program right now to possibly look at identifier signs for all easements. So, that will be sort of ties in if this is approved, ties into where the signs would go.

Chair Nakamura: Who would take the lead on the Conservation District use application?

Mr. Jung: I would probably file it.

Chair Nakamura: It would be a County initiated process?

Mr. Jung: Right.

Chair Nakamura: The maintenance of this mile long easement is something that I just wanted to get your ideas about what is the Department of Public Works saying about how this will be maintained over the long run?

Mr. Jung: Resource is always a key issue, right, in terms of allocating personnel to do certain tasks. I have opened the discussion and it becomes an issue of how to re-allocate certain personnel. That would be up to the Department of Public Works.

Chair Nakamura: With other easements that we require as a result of zoning or subdivisions, the maintenance of these public accesses, is it usually with the County or is it with the developer or landowner?

Mr. Jung: It depends. There are some where, like the Kaua'i Lagoons, where they actually wanted to maintain it. They want to maintain it. Kukui'ula, they maintain their trails that go through up there. A lot of the resort developments want their view of how it should look. In this case, I do not have an affirmative call yet from the applicant in terms of what they are going to do out there. But essentially, it would be brush cutting and grass mowing.

Chair Nakamura: At this point the assumption is that it would be the County's responsibility to maintain?

Mr. Jung: That would fall upon us, but built into the document is the option for the grantor. In this case, it would eventually probably be the Homeowner's Association of all of those homeowners within there to do maintenance of the trail.

Chair Nakamura: Do we have flexibility? It is built into the current...

Mr. Jung: Into the Grant of Easement.

Chair Nakamura: Into the Grant of Easement, that they have the option?

Mr. Jung: They can come in. The grantee and the grantor have the option to do maintenance. We just have to give each other five (5) days' notice of what improvements we intend to do.

Chair Nakamura: I think that is something that we should look into and maybe clarify who should be responsible for it. It is more of a notification piece?

Mr. Jung: Yes, remember it would be our easement so liability would fall upon us. There is an indemnification provision within the easement document.

Chair Nakamura: So, that is the other issue is the liability piece. I know that the County does not have an indemnification from any accidents occurring on these paths.

Mr. Jung: Well, because the landowners own the land and we are getting an easement, whenever we accept a Grant of Easement, we have to indemnify the landowner.

Chair Nakamura: We indemnify the landowner?

Mr. Jung: Yes. So, we actually indemnify them.

Chair Nakamura: If there is an accident that occurs on this public access, the County is liable?

Mr. Jung: It depends on the context and I do not want to open up that discussion of liability.

Chair Nakamura: I know there was State legislation that we were looking at one point in time to give Counties a break from this potential liability and I wanted to tie that discussion in at some point in time. Maybe at the same time that we do the Executive Session relating to the issue that Councilmember Yukimura brought up, Koontz case, that we could also discuss this issue?

Mr. Jung: Sure.

Chair Nakamura: I would like staff to write up the Executive Session broadly so that all points can be covered. I have a question, have you had an opportunity to talk to the landowner about Quiet Title Action?

Mr. Jung: Not in particular, but the landowner's representative is here, if you want to ask him.

Chair Nakamura: Because you are saying there are two (2) options, either the State initiates it or the landowner initiates it.

Mr. Jung: Sure. Anyone who perceives a claim to be on their property, they can try and file it whether it is the landowner or even the State who asserts a claim, can try and file it.

Chair Nakamura: Would it be possible to call the landowner's representative here then to address this question? Ian, why do you not stay there?

Mr. Jung: Do you know how bad that looks?

MAX GRAHAM: Good morning, Council Committee Members. I am Max Graham and I am representing the landowner to some extent in this matter. I prepared the Grant of Easement document.

Chair Nakamura: Thank you. Were you also representing the landowner in the subdivision action?

Mr. Graham: I represented the landowner when the landowner undertook the *kuleana* relocation and that was completed back in, I am thinking, 2008 and is referred to as Kahuaina I. So, that resulted in the *kuleana* lots located on the property being relocated to a more central position on the property. Fourteen (14) *kuleana* lots were relocated and the fifteenth lot was the large remnant piece that remained. Thereafter, the landowner undertook the subdivision. I did not represent the landowner in that matter at all and the subdivision is referred to, on the maps, as the Kahuaina II Subdivision.

Chair Nakamura: I have just one question as we were talking about Quiet Title Action to identify the *ala loa* and it is either the State or the

landowner that can take that action. Is the landowner interested at all in are looking at this?

Mr. Graham: I have never discussed this with the landowner or its representatives. I would think just as observing this, that it would not be something that a landowner would wish to undertake.

Chair Nakamura: Well, that is what I am thinking because of the costs and the time involved to do it and that is why we have an Open Space Commission with funds set aside, I think, to do just this kind of thing. But so I am just wondering that to me, there is a legal aspect and there is an archaeological and cultural aspect to making that determination of where that trail, first of the all, whether there was one in the first place and if so, where it aligns along that coast? But it would involve quite a bit of resources to make that determination. But I am just wondering if the landowner, and maybe this is something to take back, is whether they would be interested in partnering with the County in order to help to make that identification possible that could then be forwarded to the State as a tool that can be used? It is just that if the State is saying that they are not going to do it on their own, then I think the County needs to assist to get it to the point where somehow a determination can be made. I guess the question is would the landowner be willing to partner with the County and State to get us there?

Mr. Graham: I cannot answer that question without talking to the landowner. I would suggest if we step back and look at this in the context of any landowner and remember, these *ala loa* trails run throughout the State of Hawai'i. The one on Kaua'i presumably ran around the entire rim of the island. The modern *ala loa* is Kaumuali'i Highway, Kūhiō Highway, and Ko'olau Road. I mean that is what our modern *ala loa* is. For any landowner to try to determine where the *ala loa* would be on its property and primarily we are talking about people, I guess, who would own property *makai* of the Kūhiō Highway/Kaumuali'i Highway. I think it is unlikely a private landowner would file a Quiet Title Action, name the State of Hawai'i, and then when you file Quiet Title Actions you have to name all of the adjoining property owners just to make sure that the boundaries all correct. That would be an expensive proposition and I am not sure how the County could partner in that because the County does not have any claim to the *ala loa*.

Chair Nakamura: Exactly, but I think what the County could do is bring resources to help to do the research and analysis that might be needed to get us there. That is just a thought.

Ms. Yukimura: How much does a Quiet Title Action cost?

Mr. Graham: I would suppose you could spend well over one hundred thousand dollars (\$100,000) on something like that. It would depend on the State's position and the landowner, by the way, could – I am not speaking now for this landowner. I will just speak generally. The landowner in filing the Quiet Title Action might take the position that there is no *ala loa*.

Ms. Yukimura: Right.

Mr. Graham: So, I am quite entitled to my property and I want to eliminate any claims by State of Hawai'i to any trails on my property. That forces State to come forward and make it is claim that is what it wants to do. Now

you are talking about litigation, a disputed case. So, depending on what happens at trail, whether you have appeals or not, you could spend a lot of money doing something like that. I think any individual landowner would be unlikely to want do that unless there was some compelling reason do so.

Ms. Yukimura: A Quiet Title Agency on an *ala loa* would potentially mean a lot of precedent that involves not just this parcel here but all of the other parcels. So, it would be a major significance and if you could establish it for those who want to establish the *ala loa*, that is a great thing. Would it be a major case, potentially?

Mr. Graham: It would take a lot of work, but it would be limited to a determination as to a State owned trail on a particular piece of property. So, the next piece of property, it would not impact other than if you determine an *ala loa* that goes across this property presumably on either side, it is locating where the continuation is.

Ms. Yukimura: Yes, that is what I mean.

Chair Nakamura: I guess you have to start somewhere. Any follow-up comments? Councilmember Hooser.

Mr. Hooser: Thank you, Mr. Graham. The discussion first started I heard reference to a six (6) lot subdivision and now I understand there are fourteen (14) *kuleana* lots plus the six (6) lots, so there is twenty (20) lots going on that parcel basically?

Mr. Graham: It started as a *kuleana* relocation.

Mr. Hooser: Right. I understand that.

Mr. Graham: So, you had fourteen (14) *kuleana* lots relocated and a large, Lot 15, was the large remnant piece and that was subsequently subdivided.

Mr. Hooser: Into?

Mr. Graham: I think into six (6). If you say six (6) – I did not...

Mr. Hooser: I think that is what the County Attorney said.

Mr. Graham: So, the remnant piece would have been subdivided into what number of lots.

Mr. Hooser: Do we not have a copy of the subdivision map showing where those lots are located? It is not in here, I do not believe, right?

Mr. Jung: It is, but it is a small.

Mr. Hooser: It kind of begs the question, if you have fourteen (14) *kuleana* lots, six (6) subdivided lots and *x* number of CPR's, if they are located along the coast and that could also impact lateral access, if it was hoped to

be established in future. Mr. Graham, while they are looking, were the *kuleana* lots all relocated to the ocean side?

Mr. Graham: No, the *kuleana* lots were relocated along the – well, some were taken out of Conservation District along the ocean and others that were further back in the valley that runs *mauka/makai* were moved to the plateau closer to the ocean.

Mr. Hooser: Thank you.

Mr. Graham: By the way, I did provide a copy. There are two (2) maps. The first map is the *kuleana* relocation map and the second map is the second subdivision map, which is that one right there.

Mr. Hooser: Thank you. Thank you, Chair. I guess I just would like to look at the copy of the map some time. I do not have to look at it now.

Chair Nakamura: Thank you. Any other questions for Mr. Graham? Councilmember Kagawa.

Mr. Kagawa: This might be for either one of you. I just want to backtrack and make it clear. So, the Planning Commission has the authority to require public access on subdivision from a public road to the shoreline that is what the Planning Commission does? Is that true?

Mr. Jung: Correct, yes.

Mr. Kagawa: In this case, when the subdivision came before the Planning Commission, they said this is the access and the subdivision was subsequently approved?

Mr. Jung: The accesses will be noted on the proposed final subdivision map and if someone brings up for discussion, then it can be discussed. I just do not roll call if this was brought up in 2010 or even in 2008 when the application first came in.

Mr. Kagawa: I guess my question is, say that this is the access that they identified, did they say what portion would be drivable, parkable? What portion is then a trail? To me, access is basically a short distance. I do not know access to anybody else seems like a mile? But for me, access means a short distance and to say – go ahead.

Mr. Jung: Not all of our access are short distances. You look at Kauapea Beach access which is probably about three quarters of a mile. The access, be it lateral or vertical, from Keālia Kai is about half a mile and the bike path goes on the distance of it laterally. Then you also have the access at Hideaways which is probably about one-third of a mile down, and then you have the access at Queen's Bath which is about half a mile. So, not all of them are put right there.

Mr. Kagawa: I understand that, Ian. But to me, I mean, the locals, people who want to enjoy the fishing and just going down finding new territory to go and enjoy, we have lost a lot of access over the years and probably due to inadequate subdivision laws where it just gave developers opportunities to

just put it where they wanted to. It should be where the County wants them to because the County is looking out for the public's interests and it is the other way around. Here we go, we are giving them all the right to go and develop, and we let them give access where they want to. It is like, what is the purpose of even coming for approval? Just do what you want. I guess the point I am trying to make is, is the only way to fix this kind of things from reoccurring to fix the subdivision laws? It seems like we are accepting accesses that are not – when it hits the public, then we are going how did we let that happen? And it is too late.

Mr. Jung: Well, I mean just so you folks understand. When the planning process happens, when it is not in the case of an agriculture subdivision like this, but in the case that someone wants to do an Land Use Commission (LUC) redistricting and then another County's breed zoning and come in for the entitlements, I think the Council has been very adept to making sure there is adequate access through exactions under zoning amendments. So, hit them from the outset. But this particular case, the Subdivision Code is pretty limited to access off a public road. So for resorts, things like that, you have specific or a greater authority to apply more exaction in terms of how the access is going to be lined out and what the developer is going to work with. But when you get to subdivisions, it is a little more confined because essentially subdivision is the last leg of the development process next to the actual permits.

Mr. Kagawa: I understand. It is just that for me, I understand that smaller scaled projects, yes, they cannot afford to go out of their way. I am saying if they give the County the access, the land, we can improve it. We can improve it and it can be at the edge of their property. I do not see how negotiations cannot work out something better for the public going forward because I am just seeing a lot of areas like Pila'a, that you cannot even get to anymore. It disturbs me that the old Hawaiians now, you cannot take away our right to fish wherever we want and I do not have a drop of Hawaiian blood but I was brought up with the Hawaiian values that we should be able to go and fish where we want, when we want, and we should have reasonable access to enjoy the beach with our families. That is my reason for wanting us to work with the developers and try to come up with better solutions, no matter how small scaled the project. Thank you.

Chair Nakamura: Thank you, Councilmember Kagawa. Councilmember Hooser, then Councilmember Bynum, and then after that I would like to take public testimony to move it along.

Mr. Hooser: Just following up when I asked for the subdivision map and this whole discussion, Councilmember Kagawa has mentioned that no matter how small and it was portrayed as a six (6) lot agricultural subdivision, that is what I thought we were dealing with. Now, I am handing an eighty (80) luxury home site map that apparently comes off the website or something, is that what is planned for this property?

Mr. Jung: Let me clarify that. There are six (6) *kuleana* relocated lots and there was an eleven (11) lot subdivision.

Mr. Hooser: You said fourteen (14).

Mr. Jung: But the eleven (11) lot subdivision was the subdivision that triggered this particular condition.

Mr. Hooser: Right.

Mr. Jung: This subdivision was prior to the Open Density Bonus Bill that came through, but now, a development like this would be completely different so the density I think allocated to about sixty-two (62) units and then they further CPR'd that.

Mr. Hooser: At the end of the day, what we are talking about is an eighty (80) residential homes on this property?

Mr. Jung: No, sixty-two (62) residential home and I believe there is a number of agriculture CPR units, but you can ask the applicant.

Mr. Hooser: We are kind of cutting – so eighty (80) homes would be permitted on this property?

Mr. Jung: No.

Mr. Hooser: Each CPR unit does not allow a home?

Mr. Jung: No, sometimes CPR units are density list.

Mr. Hooser: Is this from the website?

Mr. Jung: I have not seen that.

Mr. Hooser: It says eighty (80) luxury home sites. My point is this whole discussion in my mind, and maybe because I am not as informed as I should be. There are a lot of things going on, but I felt it was portrayed as a six (6) lot subdivision and that is what I heard. Maybe you said eleven (11) lots and then now I am looking at this and this is a full-on luxury, supposed agriculture subdivision which I think changes the context a lot in terms of what the people's benefits would be in terms of access and in terms of lot of things. So, I guess I am just a little concerned that the portrayal of the development was not, in my opinion, accurate from a perception point of view. I would prefer to have something like this or something in here giving me a better idea of the scale of the development. I just want to put that out there.

Mr. Jung: Just so you know, we worked off the subdivision map. That is what I wanted to show up to you folks because that is where the easement was located on. Those maps would not locate, from what I understand. It probably would not locate the Grant of Easement.

Mr. Hooser: Thank you.

Chair Nakamura: Thank you for clarifying the magnitude issue. Councilmember Bynum.

Mr. Bynum: So, there is an authorization for eighty (80) homes in this parcel, correct?

Mr. Jung: I have seen sixty-two (62) on the subdivision map. I am not sure where eighty (80) comes through, but there might be an issue with the *kuleana* relocation. It is a part of the separate zoning.

Mr. Bynum: This is an agricultural subdivision, it came in before the Open Space Density Bill changed the density, is what that what I just heard you say?

Mr. Jung: Correct, yes.

Mr. Bynum: So, these roads that are shown here are going to be built, correct?

Mr. Graham: Yes, that is my understanding.

Mr. Bynum: In Princeville, at Queens Bath, you do not walk from the highway. You go on their private roads and they have a parking area at the trailhead. Why did we not negotiate a trailhead off one of these streets that would be closer to the ocean? That is what we have done in the past. Would the developer be open to letting beach access come off of one of these streets you intend to develop?

Mr. Graham: I am the representative of the developer, not the developer, so I will have to ask the owner of the property. That is a fair question.

Mr. Bynum: Is there an intention to gate the entrance to this from the highway?

Mr. Graham: None that I know of.

Mr. Bynum: That is it. Thank you.

Chair Nakamura: Thank you very much Max. Thank you, Ian for being here and answering all of these questions. I am going to take public testimony and then we are going to have our Committee discussion. Do we have a list of testifiers? If there is anyone else who would like to testify, maybe you could sign up with Yvette.

TIM KALLAI: Aloha Council. Tim Kallai for the record. If I can start once again with a little blip. This is Hope's board, but I am just going read this off this and then she will use this to help you utilize. This is off of the Kahuaaina Plantation website and this is what they state. "Kahuaaina Plantation may be the last large beachfront parcel developed on Kaua'i. The seller invested significant financial resources over seven (7) years of diligent planning to satisfy all the development requirements. This provides extremely high barriers to entry and affords protection from competition." That is in their word, on their website as they are trying to put this out. Now if I can, I am going to try to just jot this through because I know only have three (3) minutes, as quick as possible about other aspects pertaining to what we are dealing with here. Article 12, Section 7 of the Hawai'i State Constitution, traditional and customary rights, Section 7. The State reaffirms and shall protect all rights customarily and traditionally exercised for sustenance, cultural, and religious purposes and possessed by *ahupua'a* tenants who are descendants of Native Hawaiians. Public Access Shoreline Hawai'i (PASH) 1995, the State is obligated to protect the reasonable exercise of customarily and traditionally exercised rights of Hawaiians. 2008, January 22nd, OHA to the Kaua'i Planning Commission, the right of our Hawaiian beneficiaries to access and traverse the *ala* of their *kupuna* to reconnect with their ancestors and *'aumakua* for

guidance as a traditional and customary practice protected by the Constitution of the State of Hawai'i signed by Clyde Namuo and that was to the Kaua'i Planning Commission. 2010, February 9, once again OHA to the Office of Conservation of Coastal Lands (OCCL) on Lepeuli. OHA has specific concerns regarding the project's impacts on area trails particularly to the *ala loa* which is designated as State of Hawai'i Historic No. 50-30-04-1034. It is our understanding that the traditional use of this trail has never ceased. We fear the proposed fence will disrupt our beneficiaries' use of the trail and impact the trail itself. We request that the State officials and applicant consult with the community and OHA to discuss appropriate measures to mitigate the impacts of these projects and what it will have on the cultural sites and traditional and customary Native Hawaiian practices.

Chair Nakamura: Tim, that is your first three (3) minutes. You have three (3) additional minutes.

Mr. Kallai: May I continue? Thank you so much. Then finally, there is a letter that was put out, or just a quote I should say by Counsel. Tom Pierce, 2011 who was defending on a Haleakala Trail which is quite similar to the current situation that we have here. When a private party is permitted to take or diminish a public trust asset, it constitutes a breach of the public trust. When the State of Hawai'i fails to compel access, it has breached its obligation to the public and with that, I kind of end my testimony with this. But please, I know that we do have Counsel that is willing to also help our County Council with this issue and that is this gentleman that I just suggested, Tom Pierce to help us guide through these issues of the *ala loa*. Even though we make references, this is not to diminish by any point or means the Hawaiian words or terminology of trails. But yes, we do need to refer to this as a coastal lateral trail. Yes, they do call it an *ala loa* and yes, as everybody has said in testimony prior to myself a well too, there are a number of *ala loas*. But the one that we are specifically making our reference to is the coastal lateral trail. Yes, I have read through books and wonderful definitions of such things about this. But for myself, when I have gone to our *kupuna* in our area who have now passed on because of their timing and their demise, when they have talked to us and they have made references and given us their testimony personally on how they have used the coastal lateral *ala loa*, as they referred to it as. Once again, to gather *limu*, to do their fishing. These are the people that I need to go to and these are the people that I hold at heart, not so much reading it from a book as to what my description or how I am going to fancily place it in my westernized concept of what an *ala loa* was. I went to the sources. I heard them. God bless them, they have passed on. But there still are a few remaining and left that can verify these facts for us. They will tell us, yes, that they existed and still does exist, fee simple State owned lands that is called a coastal *ala loa*. We have to remember that. We cannot diminish that process. This is fee-simple owned by the State. It is the State's *kuleana* to step up and to definitely designate where this exists and we have to ask them to do that. If not, then we need to acquire either our own Attorneys or someone else to put the fire under them to finally get off of their seats and definitely designate this. Thank you so much.

Chair Nakamura: Thank you. We have some questions for you, Councilmember Yukimura.

Ms. Yukimura: Tim, I actually just want to thank you for giving us the map of the luxury subdivisions which give us a much more realistic context of this issue. Thank you.

Mr. Kallai: Right, and with that too, I can state that we have been in contact with the Project Manager. As he stated to me, even though they have gone through this and it is just a proposed, as he claimed to me, a proposal of this because it was shocking to us to see it go from the numbers, when we have seen them escalate over the years as this project has been moving on. I said, whoa, what is this on your website? Now it is up to eighty (80)? He just says it is not the full intention, but I guess they were claiming that they were going for the highest number they possibly could according to the subdivision things and then from there, they will work with what is reasonable access. Then I said, well, that may seem fine and dandy you telling me this on a personal level, but once again, if they intend to sell, even if they do not start even production on this whatsoever to somebody else, then that other person may have the due diligence or right to be able to put out the eighty (80) units, right? Because you have now acquired this. He says, well that could happen. But that is not their intention. I personally, if I could ask also of the Committee or the Council here, first and foremost, if you could have a physical site visit to really get a good understanding of what we are – it is a very complex issue, as simple as it may seem, and take a good look at what we are physically dealing with here. We have asked also, said Project Manager to come to the K&A and to fill us in on certain things. I think he is in talks with our President to do such a thing.

Ms. Yukimura: Thank you.

Mr. Kallai: And Councilmember Kagawa, I really appreciate the fact that you have brought it to the forefront that for a fisherman or to anybody to be able to hike a mile down even to just....

Chair Nakamura: Tim, I think you answered the question.

Mr. Kallai: Thank you so much.

Chair Nakamura: And we just need to move onto to the next speaker. Thank you.

HOPE KALLAI: *Aloha* and good morning. Thank you for addressing the *ala loa*. It is really dear to our heart and we have been working...

Chair Nakamura: Introduce yourself for the record.

Ms. Kallai: I am sorry, Hope Kallai. I have to submit to you folks thirty-seven (37) files concerning the *ala loa* between Moloa'a and Waipake. I have three (3) letters from OHA and the letters from Open Space Commission and Chairperson Aila. But mainly I want to address OHA and thank you Councilman Rapozo for bringing that to the table because I really think OHA needs to be involved in this. They know they do. In 2008 when talking about Moloa'a, Clyde Namuo, OHA Administrator said neither the developers, paid archaeological consultant, nor the State Historic Preservation Division possess the capacity to determine whether any historical site found and evaluate meets the criteria for having an important value to Hawaiian people. That is the obligation to meaningfully consult with the Office of Hawaiian Affairs so that Hawaiian people can determine what is valuable to them. The Kaua'i County Planning Commission as a sub-agency of the State of Hawai'i in prior to issuing substantive decisions impacting our Hawaiian beneficiaries must closely assess the impacts of these decisions on the constitutionally protected rights of Native Hawaiians to exercise

their traditional and customary Native Hawaiian practices such as gathering *limu kohu* on the place and manner of their *kupuna kahiko*. We look forward to the intervention by your Department in conjunction with our office to uphold the public trust responsibilities to protect the historic legacy of Hawai'i and prevent irreparable loss as may be the Moloa'a trail, and the *Ala A Na Kupuna Kahiko*. There is a lot of confusion about the terminology *ala loa*. I would rather – usually I would honor the 'Olelo Hawai'i, but here if it is confusing, there are fifteen (15) different kinds of *ala*: *alanui*, *ala loa*, *ala hula*, *ala hele*, *ala au*, *ala oli*, *ala uli'ili*, *ala haki*, *ala pilipa'i*, *ke ele wa'a*, *ala nui aupuni*, and *ala* or *pa'ala*. *Alanui aupuni* is a government road or trail, that is what the public road then now known as Ko'olau Road is. It is an *alanui aupuni* and the reason these concentric ring trails were made was the need for speed. The lateral coastal trail is more of a footpath, the inland, what is now Ko'olau Road, is...

Chair Nakamura:
three (3) additional.

That is your first three (3) minutes, Hope,

Ms. Kallai: Thank you. Is a horse trail, a cart road. If I had time I could explain to you the difference between the catholic priests from Moloa'a accessing the Council Dudoit Princeville lands and the reason they did not go on the *alanui aupuni* or Ko'olau Road was because of the Johnson meeting house. There was a lot of Catholic-Calvinist discrimination going on and the two (2) trails were distinctly used by two (2) user groups then. I reiterate the request for a site visit. This is a huge project that really needs to be looked at. Open space Commission has not had a chance to look at. The user community has not had a chance. The traditional user group, the *limu* pickers have not been consulted in this. One of the reasons that State has not chimed in on the *ala loa* before was because there was no development need. We need to bring to the State's attention this project cannot continue in Waipake until the State chimes in and locates the *ala loa* in fee simple where the State landholdings are. In Waipake, it is really not as obtuse as it is some places because it connects to *makai kuleana*. Now, these two (2) maps were presented by Falko Partners during this subdivision process and both of them have the *ala loa* on the maps presented by Falko. It is really hard to deny the existence of something that you put on your map that you submit to the State. So, this is their well map. They have five (5) or six (6) wells already, fifteen (15) water spigots and they are applying for three (3) more injection wells. They have mapped the *ala loa* there, mapped *ala loa* there, and in their original subdivision map Lot 13 does not go all the way to the beach. In your packet, you were given C 2013-271 and that is a new revised subdivision map that I do not believe anybody else has seen and match is ineligible and the map is illegible. You cannot see it and all of a sudden somehow, there is a new easement that has been considered because the first one did not go all the way to the beach. If you have an add advertising as high barriers to access and a trail that is not intended to get to the shoreline, we need to take a look at this. Right now there is a gate right here and if this is going to be the access and this is their water tank, we need to talk about this. Also, it is pedestrian only. You have a mile road, how come we cannot ride bikes? How come you cannot ride a bicycle at least half of the way down? We have requested Falko come to K&A and talk to our community about this, but for some reason they did not show up last meeting and there is no reason to make this decision without the opportunity of a site visit and community and OHA involvement. Thank you.

Chair Nakamura:

Thank you for your suggestions.

Ms. Kallai:

So, I have all this stuff.

Ms. Yukimura: Question.

Chair Nakamura: Hope, there are some questions for you.
Councilmember Bynum.

Mr. Bynum: Hope, thank you very much for being here today. I just want to talk in generalities really quick. You have done so much work on this and from my discussion with the State, you, and landowners in the area, the argument that there was no *ala loa* to me is silly. But there are areas where the *ala loa* in this area is already clearly defined, correct?

Ms. Kallai: Yes, and during this process there was an archaeological assessment performed by Hall Hammett. The *ala loa* connects two (2) *kuleanas* that were probably GPSed so it is...

Mr. Bynum: I do not mean to cut you off Hope. So, you have this *ala loa*, traverses the coast, and then all of these parcels that are now private property, right? Some of those parcels, I understand, have already identified the route of the *ala loa*?

Ms. Kallai: Yes. If you can look at this one, the *ala loa* comes from 'Aliomanu and the 'Aliomanu maps, it is called the Moloa'a Trail. It goes to Moloa'a and then Na Ala Hele, in the past decade cleared up the location of the *ala loa* in Moloa'a Bay Ranch. So, this segment of the *ala loa* is identified and I believe meets and bounded...

Mr. Bynum: You have to be close to the microphone.

Ms. Kallai: Oh, I am sorry.

Mr. Bynum: Again, I do not want to take a lot of time with this. Then there are other segments, where it is in dispute, right? So, the point I am trying to make, in your research on some lands it will be easy for the State or it is already identified and cleared other lands because the State did not do something fifteen (15) years ago, it is more complicated?

Ms. Kallai: Right.

Mr. Bynum: So, each one is a different circumstance?

Ms. Kallai: Right.

Mr. Bynum: Right, that is really what I...

Ms. Kallai: So, now is the time really for the State to step in.

Mr. Bynum: Right. So, presumably the State will maybe someday get the resources to pursue this again and I really like Councilmember Nakamura saying that maybe the County needs to partner more and some of us are in the process of doing that, our Open Space Commission and as you know I am working on a Resolution related to *ala loa*. But when I look at this subdivision map we are going turn all of this into private property and there is no room to put an *ala loa* through here.

Ms. Kallai: Thank you.

Mr. Bynum: What a shame.

Ms. Kallai: What a shame.

Mr. Bynum: Whether it is legal or not, that we are not in a state where somebody comes in because even if we had to condemn it, it would be a lot cheaper to condemn it before the subdivision is in.

Ms. Kallai: Right.

Mr. Bynum: Then well it is got to go through nine (9) different properties now.

Ms. Kallai: Right.

Mr. Bynum: It is pretty appalling to me and do you agree and then I am done, that these efforts that were pretty assertive in the 1980's have just stopped?

Ms. Kallai: Yes.

Mr. Bynum: William Aila is saying that we have no present plans to pursue this. I think I am going to ask a follow-up question. I think it is a resource issue. They would love to pursue this, but they do not have the staff or the resources. Is that your understanding of the State's position?

Ms. Kallai: That is any understanding.

Mr. Bynum: Okay, that is all.

Chair Nakamura: Councilmember Yukimura, and I think we need to take a caption break in five (5) minutes.

Ms. Yukimura: So Hope, hi. Thank you for being here. What makes you say that bikes are prohibited?

Ms. Kallai: It says pedestrian only and we have not had the discussion. We have not been afforded any community involvement on this.

Ms. Yukimura: I would like later perhaps, Chair, after the break, to have Mr. Jung back on that issue. Thank you.

Chair Nakamura: Any other questions for Hope? Thank you. Next speaker. I am sorry, we are going to – because we do not want to cut you off, we will take the caption break now. Is that okay?

There being no objections, the Committee recessed at 11:11 a.m.

There being no objections, the Committee reconvened at 11:31 a.m., and proceeded as follows:

Chair Nakamura: I wanted to just let the Committee members know that we have six (6) speakers that we want to get through. Can you call the next speaker? Sorry to interrupt you earlier, but if you could state your name for the record.

PETER WALDAU: Peter Waldau for the record. We just had a break and I just want to reiterate a couple of things that I think I need clarity about. In the PowerPoint we saw three (3) properties described, one Moloa'a Bay Ranch let us say is an ideal situation where both property owner and State, all agree on the *ala loa*. They come and they located and we have a perpetual public access laterally along the shore at Moloa'a Bay Ranch. Another property we discussed was Lepeuli where the property owner is on record as being opposed to the lateral trail. But then we also have the current agenda item which is Waipake and where have we heard the owner, Falko Partners, weighing in on the *ala loa* at Waipake? The other question is where have we heard the State weigh in on the *ala loa* at Waipake? Now Nadine mentioned this August 8th letter in response to Open Space Commission's July 12th letter was saying that they have no present plans to take any action on this trail. This trail at Lepeuli and keep in mind these two (2) letters have nothing to do with Waipake. In cases where both the State and the property owner are agreed, look at what happened at Moloa'a Ranch. Let us not be focusing on what happened at Lepeuli. That is something I think we need to be clear about. Where have we heard the State weigh in on Waipake? Where have we heard the property owner weigh in at Waipake? We have heard Max Graham saying that he never discussed the *ala loa* with the property owner. Ian Jung does not represent the property owner. Where is the property owner? What we do have is allegedly, verbally that the Sean Smith, the Representative Manager says that the trail exists and needs to be located. If that is the position of the property owner, why are we not seeing Waipake analogous to Moloa'a Bay Ranch where this could all be you a done deal? Why are we discussing Quiet Title, legal actions, and that types of things?

Chair Nakamura: That is your first three (3) minutes, you have three (3) additional minutes.

Mr. Waldau: I only have one other point and that is that I am really hearing the piece about partnering and cooperating on issues the broader *ala loa* issue, outside of Waipake. For example, at Lepeuli, how do we coordinate/cooperate dialogue and get this lateral trail located prior to development? I guess that I want to just put out there that they are hiring outside Counsel may be an option, that Tom Pierce has expressed a willingness to be that outside Counsel, that he has experience doing this kind of mediation and moderation between County and State. I am just wanting to put that out there as far as "bang for buck," that we could possibly ever dream of, getting outside Counsel to facilitate on the *ala loa* might be a good idea, in my opinion.

Ms. Yukimura: Question.

Chair Nakamura: Councilmember Yukimura.

Ms. Yukimura: You said somebody specifically has offered to help?

Mr. Waldau: Yes, his name is Tom Pierce and he has worked with the County.

Ms. Yukimura: Thank you.

Mr. Waldau: He was involved with the Haleakala ranch trail in Maui. So, he has been through dialoging with the State. He has so much experience with this kind of thing.

Ms. Yukimura: Your point on we have not talked to the landowner...

Mr. Waldau: Have we?

Ms. Yukimura: Or to the State regarding this particular piece of land before us?

Mr. Waldau: Have we?

Ms. Yukimura: Not to my knowledge. So, your point is that in talking to them we might find more agreements than we are expecting or assuming?

Mr. Waldau: Verbally, what we have from the Property Manager is that who is Sean Smith, by the way is our acting Board of Land and Natural Resources (BLNR) Representative for Kaua'i. Verbally, alleged...

Ms. Yukimura: He is a conflict of interest.

Mr. Waldau: Allegedly, that he is say that the *ala loa* exists and needs to be located. If that is position of the property owner, again, it is an if. I am just putting it out there, if that is the position of the property owner, then might we be looking more at a Moloa'a Bay Ranch situation where State and property owner is saying that we are all on board and it is just a matter of locating it? It may be that simple.

Ms. Yukimura: Alright, thank you very much.

Chair Nakamura: Thank you, next speaker.

RAYNE REGUSH: Good morning, Councilmembers, Rayne Regush, for the record. I serve as the Sierra Club, Kaua'i group Executive on the Executive Committee. Thank you for looking at this item so carefully. My first comment is to make a clarification on the presentation and at Moloa'a, the State located the historic trail through that *ahupua'a* with metes and bounds because the landowner offered to pay for that survey, but unfortunately there was no public input during that process despite Sierra Club's request directly to the State that key stakeholders be present for that survey. Again, that is a very critical issue for perhaps calling for a site visit with regards to this easement. The result was in Moloa'a, that part of the trail was pushed significantly *makai* closer to the bluff along the beach with is subject to erosion. Again, your scrutiny for the exact placement of the easement is important. Regarding the historic *ala loas* through this corridor, picture them as being traversed by *kuleana* owners and others as transportation. It was to move between *ahupua'a* and of course it is difficult to walk quickly on sand. I do not know if we have an opportunity with this easement to attach conditions to it. I think it is important to look at Keālia Kai as a good example. You can discuss or negotiate the number of cars in the parking lot. I am

surprised that we do not know that at this point. What sort of fencing? With Moloa'a Bay Ranch the public was very interested in four (4) foot high wood split rail wood fencing so it would blend in with the environment instead of six (6) foot tall chain link. Lots of things to think about and it would be great to learn if Council has recommendations of conditions to go with this easement. The State's claim to the *ala loa* it may not be your jurisdiction, but your investigation is really critical and you are all probably familiar with the Hawai'i State Legislative Reference Bureau's white paper decades ago, written called Limbo Roads. I hope you all have a copy of that and basic the recommendation was that the State and County work together for the public benefit to resolve issues like the *ala loa* limbo roads, trails, easements unimproved roadways, and all that were used by the public during the territorial days. Now that we have State and County, we need to bring them together to ensure the public benefits.

Chair Nakamura: That is your first three (3) minutes Rayne, you have three (3) additional minutes

Ms. Regush: Thank you. Public Access and Open Space Resources Commission, they have a long list of these issues. They have been nicknamed '*ōpala*' because there is a lot of cleanup work and it is not easy because you are looking at State and County overlap for these government entities and government trails and then to get them recorded into the Bureau of Conveyances. So, again the recommendation that is being made, Tom Pierce is an Attorney who has expertise in land use and conservation and he would be a wonderful resource to assist in efficiently discussing this and resolving it. I think that is it for now. I do not want to miss this opportunity to secure this *mauka/makai* easement, but I would like it discussed further so we understand – first a site visit and then understand what grounds we have to negotiate for, fencing and aesthetics and such and where the parking lot is place as well because easy access is important to *kupuna* and everyone.

Chair Nakamura: Thank you very much, Rayne.

Ms. Regush: *Mahalo*.

Chair Nakamura: Questions?

Ms. Yukimura: Question.

Chair Nakamura: Councilmember Yukimura.

Ms. Yukimura: Thank you, Rayne. At the Moloa'a Ranch parcel, there is a lateral access that is fenced. Is that access their fenced?

Ms. Regush: I have not been up there a long time, but no, back in the day, they never put in the fencing. But again, I have not been there for years.

Ms. Yukimura: I mean I was there maybe about eight (8) years addition and I was not even conscious there was a lateral access. I do not know if it was marked.

Ms. Regush: That speaks again to maintenance, what the agreement is between County and landowner as to how the trail is maintained. How, who?

Ms. Yukimura: And chain link fence would also rust away really quickly. So, there are maintenance issues about fencing too.

Ms. Regush: But yet that is what we see in Lepeuli.

Ms. Yukimura: Thank you very much.

Ms. Regush: Thank you.

RICHARD SPACER: Good morning acting Chairperson and Councilmembers. Richard Spacer for the record. It is nice next to be back again and nice the microphone is already working for me this time. I want to second the thought that Tom Pierce would be a good idea for us to retain for outside counsel. He has experience. If there is something that he does not know, I am sure he could ask the people at Native Hawaiian legal as far as these native right issues and *ala loa* trails go. I would ask you to, in the next two (2) weeks, to consider using the funds that Open Space Commission has for that purpose and doing whatever it is you need to do behind the scenes to make that a vote and make that possible. Regarding the *ala loa*, someone outside during the break told me it has nothing to do with this discussion. I have to reiterate as I did two (2) weeks ago, that it does. OHA and State Historic Preservation Division actually do have some input on this. Like I said two (2) weeks ago, the *Ala loa* trail runs along near the sea, parallel to the shore. It is not a supposed *ala loa*, it is not a purported or alleged *ala loa* as I have been hearing the staff of the County Attorney's Office saying. In the second Na Ala Hele memorandum by Doris Moana Roland that you have in the OHA letter to William Aila, the term *ala loa* is used not less than six (6) times and that is not counting all the other correspondence we have. This morning it was pointed out that the *ala loa* is claimed only by the State when Julie China came in the title quiet case in 2005-2008 and claimed the *ala loa* for the State. In Parcel 10 which was owned by someone named Pelehu, that parcel, that *kuleana* was less than one-third of one acre. Do any of you or anyone in the State really think that the *ala loa* trail only existed on a property of one-third of one acre and nowhere else in Waipake? Pelehu and others who visited Pelehu and fished and did of what they did used that trail to get there and continue on to wherever they may go. The same trail in Lepeuli and Ka'aka'ainu, and Molo'a, and points north and south. I echo Councilmember Bynum's assertion that a denial of an *ala loa* trail on these coastal properties is silly. But beyond that, I can show and my fellow activists in this matter can show any interested property owner whether it is Wai'oli Corporation and I see Sam Pratt is here today from Wai'oli.

Chair Nakamura: That is your first three (3) minutes, you have three (3) additional minutes.

Mr. Spacer: Thank you. I have extended an invitation to him to explain why that *ala loa* trail is on that adjacent property to the agenda item and I extend an invitation to anyone from Falko Partners why we can show that it is on their property as well. That is really about it. We know this trail runs through all these properties. It is not in a property of only one-third of one acre. The Big Island, I forget to mention that. They welcomed their *ala loa* trail, the Ala Kahakai National Park and I have been in contact with Eric Arakaki who is the

National Park Service Superintendent there. I do not have them in time for this meeting, but they are sending me some colored booklets that describe their trail over there, their public *ala loa* trail that they manage for the benefit of the community on the Big Island. I would like to share that booklet with Falko Partners and Wai'oli Corporation as well and with you Councilmembers to show that you the Big Island community has embraced this concept of *ala loa*. It is a community trail. It belongs to all of the people and it is not something to be feared. It can certainly be managed and I do not see any dramatic increase in the number of visitors to any one particular section of our coast simply because this trail and the *mauka/makai* easement that you are considering, which I support, by the way. Once as I said two (2) weeks ago, we clear up all the issues of title and *ala loa* and where it intersects. I support these ideas and hope you will, too. We have the right to public access. *Ala loa* access is guaranteed under state law, Hawai'i Revised Statutes 264-1. There is Circuit Court case law in Hawai'i that historic trails are public trust. That means the State cannot abandon them without due process, as I described earlier. They have to take action and the not taking actions in these various properties is a misfeasance. The State has a duty to take charge of these trails and reassert public usage over them and that is what is missing from the equation here. So, at some point they must necessarily do that. Like I said two (2) weeks ago, that *ala loa* intersects with this proposed construction project. So again, sooner or later you have to have all of these things surveyed and metes and bounds and it makes sense to do it all at the same time. You might also appropriate fund from whatever source there may be available to have these things as well as Tom Pierce. If you can assist the State, perhaps the State would move forward.

Chair Nakamura: Thank you very much. Are there any questions?

Mr. Spacer: Thank you.

Chair Nakamura: Councilmember Yukimura.

Ms. Yukimura: Where is this *ala loa* being managed on the Big Island?

Mr. Spacer: By the Ala Kahakai National Park. It is a unit of the National Park Service and they have the same booklet that I was hoping to have online here.

Ms. Yukimura: It is so much easier if the fee-owner is a public entity, that like the Kilauea Lighthouse is a twenty-four (24) hours/seven (7) days a week management. So, the *ala loa* goes over National Park property?

Mr. Spacer: On the Big Island, yes.

Ms. Yukimura: I understand. Thank you.

Mr. Spacer: You are welcome.

Chair Nakamura: Thank you very much.

Mr. Spacer: Thank you.

Chair Nakamura: Next speaker, please.

GLENN MICKENS: Thank you, Nadine. Thank you B.C.. For the record Glenn Mickens. I compliment members of the public for doing some excellent research on this issue and the information that they presented today. I believe that Ian said it is not mandatory for either the County or the State or private party to maintain these trails, as I think Ross pointed out. So, why are we not going back to the heart of the problem and making sure that someone is a designated party to maintain these areas and then making sure that manpower is there to do the job? I mean, I think this is the basic problem. Somebody that did not do their job, but who was it? Why have we not gone after what is going on? Our Department of Public Works, they cannot maintain what they have now. So, either they hire more workers or everything is going to just remain in disarray, if our Department of Public Works is the designated people that have to clear these areas and keep them open. People should not be made to do someplace that is different just because they cannot get there, so they go to another area that is maybe restricted. But it is wrong as members have said, that the best access to this beach has been denied due to a manpower problem and possibly to a planning department that did not represent the people. Again, we go back to what happened with the problem? We are sitting in a place at this stage in the game deciding what we are going to do. We have to go back revisit what should have been done in the first place. Why do we not go back and find out what the problem was? If we have a planning department that is not representing the people – well I know that is not your job. It is the Mayor's job to appoint the people. But if they do not represent the people and they issue permits, now you are going to sit here and you folks are going to be responsible saying that we have to go back. Max Graham sits here, what it is going to cost? Hundreds of thousands of dollars to go ahead and revisit this thing. Something is definitely wrong with that picture, no doubt about it. Anyway, you got your work more than cut out for you. Again, the members of the public have certainly highlighted what has to be done. Thank you.

Chair Nakamura: Any questions for Glenn? Councilmember Bynum.

Mr. Bynum: Glenn, I want to thank you for your testimony and I agree almost completely, which did not always happen with you and I. But I do want to point out that the Department of Planning has to follow the law and policies set by policymakers like us. But part of your testimony that the State has dropped the ball, the County has dropped the ball, we have been out lawyered, outmaneuvered, out weighted, that is what you are saying?

Mr. Mickens: Yes.

Mr. Bynum: And you are correct. Thank you.

Mr. Mickens: Thank you, Tim.

Chair Nakamura: Next speaker.

RANDY NAUKANA REGO: Aloha, my name is Randy Naukana Rego. I do live in Waipake and with our history there. My family was part of the lawsuit in 2005 so we know mostly on the eastside, because that is where our *kuleana* was done by the beach. In 2005, we were forced to sell under the Kāua'i Title Laws so we had to give that up. The only reason we got back in there was when they found bones and Falko, by the law, had to put in the paper, and I applied and when the Department of Land and Natural Resources (DLNR) looked at it, there was no

question our family history there. I was granted cultural ties to the bones. We have not done the DNA to get family ties. With the Kaua'i Title, it took my access away. With the bones finding in there and State DLNR confirming our family's rights there and our history, I was able to get access back and what Hope brought up is to take a look at that easement, and agreement because initially, they were granting me only pedestrian easement I told them no way you walk from Ko'olau Road down. With all due respect, if the County did that in twenty (20) minutes, that must have been a very brisk walk because that is a very long way down. I had to fight tooth and nail to get vehicular access. So, be very careful in the wording and what is in the easement. I think you folks hit it on the nail that obviously what we know is that the DLNR is not coming on board with what they should be doing, they should be in this process, even in the lawsuit, in my copies, it shows the State's responsibility for the *ala loa* and they should be here. So, it is disappointing that the DLNR is not taking steps to be in there. What the County can do to make sure of their participation in this, I am not too sure, They should be involved. Maybe OHA, like you suggested, OHA can get into it too. They have some funds to help out there, too. But the State has got to get involved. It is obviously shown that they have a responsibility to protect the public interest here. I do applaud your efforts to keep the public's interests in mind and in looking over this, obviously, it looks like the planning procedure is flawed. As some of you have mentioned, you should not be at this point talking about the easement and determining what to do. That should have been part of the planning process before they got final approval. Looking at an Ordinance or going to what was in the time approval, whether there was a stipulation stating that additional conditions could be brought forth against the development or the subdivision has to be looked into. Obviously, there is a planning flaw here, where you folks at this point now have to pick up the ball and how to do the easement, that is planning. You do not approve the final approval without all of the issues being resolved. So, yes, you folks hit that right on the nail so I applaud that, too. I agree with Mr. Rapozo, you do not agree to easement and you do not know where the *ala loa* is. You have to know where that thing is first to see how it goes. I applaud your efforts that you can do to help and I guess I am just old school, but liability. For me...

Chair Nakamura: Sorry, that is your first three (3) minutes, you have three (3) additional minutes.

Mr. Rego: Just this last thing on liability. I do not know how we got into this liability thing. But I am old school. If you go and fall off the cliff, that is your fault. There is a cliff. Do we have to put a sign "this is rock, do not stub your toe," "this is a tree, do not hit you head." There is a cliff. Even when I take people down to the easement on the West Side I tell them, if you fall down, we are not go to sue Falko Partners. Be careful. This is you responsibility. This liability thing that you folks are thinking about, I do not know how to get around that. Put up a sign saying that if you are going to use this trail, use it at your own risk which means you take the responsibility yourself to take care of yourself. *Mahalo*.

Chair Nakamura: Thank you. We have a question for you.
Councilmember Bynum.

Mr. Bynum: Randy, thank you for being here today, two (2) things, I lost the first one. But in the past you have talked about your family was farming in Waipake and you lost water because of agriculture subdivision. Can

you just real briefly remind me how that happened? How is it that you have land with agriculture water on it, your farming it, and you lose that?

Mr. Rego: Again, we did not know anything about Waipake. It was when the damage happened that we checked titles and that is how we find out that our family owned it and got it from The Great Mahele. It was when the subdivision was approved again. My *kuleana*, if it was put in any other place would be okay. But it is the drain of ninety-eight percent (98%) or ninety percent (90%) of Waipake. I get the drainage from everybody and with the conditions that has been always my fight was that conditions of the subdivision approval were never enforced. They did not put up wind and water erosion measures so even when we found out the plans, culverts put in any place that were never approved and that was confirmed by the engineers. So, the one that comes to my *lo'i*, it is a two hundred (200) foot big gulch. You cement that whole things and now you have a four (4) inch pipe that comes out like a bat out of hell now. It does not spread out with the force, which was taken care of. So, that floods me every single year. My dad, who passed, and I we stopped cleaning up I would say probably in 1998. I do not use my *lo'i*, my property anymore. It is continuously getting damaged and that is one thing I have still been fighting with.

Chair Nakamura: Councilmember Bynum, I think we may be off-topic with the agriculture water issue.

Mr. Bynum: I am done. Just one sentence. So, what I get from that you were actively farming the land, but because of the subdivision, you no longer can?

Mr. Rego: No, everything is gone.

Mr. Bynum: Thank you.

Chair Nakamura: Thank you very much.

Mr. Rego: I may say one thing, I applaud Hope and what she did, and excellent research and I want to thank her for bringing this to my attention because anything Waipake is close to my heart.

Mr. Bynum: Thank you, Randy.

Chair Nakamura: Next speaker, please.

ALICE PARKER: Hi, Alice Parker for the record. I think we have a moral mandate to find out the original path, the *ala loa*, because it is essential to the island. We need access to it. Perhaps if individual landowners could get a break for taking care with littering and brush and all of that with their property, but facing the *ala loa*, something like having them yearly substantiate the efforts that they have had with paperwork or something to the Tax Department so that they could get a break on their real taxes. I think it comes down frankly, to economics with most of these landowners. So, that would help. We need to know where that is. I think Mr. Kagawa brought up a very good point for the access points to the ocean and to the trail. It is got to be accessible which means a decent grade. I mean, if you want to take a more scenic route, yes, you can risk the cliffs, but some of us have getting well, me, I am getting older and frailer and I am not the goat I used to be, although some of you might not agree with that. But we would

like access to it. It does not have to be a paved path, but a decent grade. Thank you.

Chair Nakamura: So we will go back to the Committee discussion.

There being no further testimony, the meeting was called back to order, and proceeded as follows:

Chair Nakamura: Members, one thing I would like to say that based on the discussion that we had and to try to move this forward, I would like to schedule an Executive Session next week with County Attorney Ian Jung, so we can go over two (2) major things. What are the current legal cases that directly impact this case and the second thing is the County liability issues that I think is more appropriate in Executive Session. So, that is one thing and then the following week would be a Committee Meeting and at that time, I would like to continue on with the discussion with that Executive Session briefing and that knowledge so we can hopefully put this on the next Committee agenda. I clearly see concerns, hear concerns about the distance to the shore, number of parking, lateral access, maintenance, and so forth, and I think we need to continue this discussion. So, that is my intention to move in that direction. Committee members would you like to add to this? Councilmember Bynum.

Mr. Bynum: Thank you, Committee Chair for explaining the process going forward. I concur one hundred percent (100%). I want to make some closing statements and I do not think I will need a lot more discussion today in the sake of time. But what I want to say and I am timing myself here. In 2000 the General Plan told us to stop these practices. They told us to stop doing agricultural subdivisions, masquerading as farms. They asked us to sunset the Additional Dwelling Unit (ADU) law, and it took five (5) years. They asked us to take away the open space density bonus that developers used to have more and more properties, and it took ten (10) years. They asked us to disallow this practice of agricultural subdivision masquerading as farms and a majority of the Council has voted against doing that four (4) times in the last ten (10) years, a majority of the Council. These issues are very important. Our former Mayor Baptiste put forward a Bill to get the County involved in this lateral access issue and it sits pending a workshop or something for the last eight (8) years. He had a Bill about disallowing gated communities saying this is not a community that we want to have big sections that you cannot go and that are exclusive. Those Bills are still sitting. I wanted to show that subdivision map that is on the website for sales of this. They said that this is the last time that you will have this opportunity because well we did do the open space density bonus. It took us ten (10) years, but we did it. But we never said we are not going to continue to subdivide agricultural land and pretend they are farms. So, what you see here are the roadways. Most developers take that internal road, find a section near the ocean, and provide the access, right? Why is it a mile? Why not use the internal roads? Well, maybe because there is an intention to gate it. But more importantly here is this whole concept of an *ala loa*. We have been doing these struggles for years and the government gets forward. I just gave you some examples where the County tried. The State was actively pursuing this *ala loa*. I have seen the documents in the 1980's because of budget cuts and resources they are stopped. What they are saying now, the State is not *malama 'aina* very well whether it is corn or anyway, I will not go into those things. I have to stay on topic. The topic is we have been fighting this battle. Why are we not negotiating the lateral access now? We all know we need it. We want it. It is the

right thing to do for the State of Hawai'i. I do not think anybody in the community is going to question that. So let us get the mechanisms to go there. I mean, we do have the power right now, if we needed to, if it was the only way to say we will buy an easement through there and through condemnation, if we buy it before they put roads and houses in, it is going to be a heck of a lot cheaper than if we have to negotiate with fifteen (15) landowners to get this lateral access through. So obviously. This is going to be a huge barrier to this goal that has been out there since statehood, since before statehood. Because the County and the State has been inept at putting these things forward so for this particular instance, there are obviously some things that we need to discover. The Committee Chair recognizes that. I am supportive of a deferral. But rather than try to deal with each of these individual legal battles, let us get a framework in place that says clearly this is our goal and I loved what Councilmember Nakamura said because that is what the County has been doing over the years where the State has dropped the ball, we have been providing them assistance. Most communities it is the other way around. The State provides the Counties. I think the *mana'o* on the Council is good, but we have to get the regulations in line with that and let us do whatever we need to do to not create this barrier to a goal that I think is good for all of us. Four (4) minutes and seven (7) seconds. Thank you.

Chair Nakamura: Thank you very much for tracking your time,
Councilmember Bynum. Councilmember Yukimura.

Ms. Yukimura: I want to thank the citizens who have really alerted us to this issue and the importance of it. I also want to thank my colleagues who have also understood or sensed the importance of this. I think we need a framework though with which to deal with it because there are so many aspects of it in order to make it work well. I mean we do not want for example, Kē'e Beach, to happen with the *mauka/makai* accesses and we have to think about resource protection as well as how to provide access. So, this is a real management issue and I think it would do well for the Council and the County to assert our interests on behalf of our citizens and see if we can work with the State on this issue.

Chair Nakamura: Thank you, Councilmember Yukimura.
Councilmember Kagawa and then Councilmember Rapozo.

Mr. Kagawa: Thank you. I would also like to thank the members of the community who have put in a lot of time and effort. Myself and Mr. Rapozo went out to walk some of the *ala loa* with the Kallai's and it really opened my eyes as to how important it is the work that they do in trying to preserve for the future-public access to beaches. We are losing a lot of it due to subdivisions, poor subdivision laws, and I hope that even though it seems that we cannot do nothing that we can go back and negotiate and work out a deal that can be one that is sensitive to the public needs, the public rights as far as going fishing. We live on Kaua'i because of our beaches, our ability to enjoy the beaches and the fishing. That is the most important to us, that is why we live here. If not, we would be living in the mainland or on O'ahu. I think we need to go beyond where we are. We need to go back to negotiations. We need to preserve that *ala loa* that is on the map of Falko Partners. We need to identify it. It is on the map. It should not be that hard. We cannot allow Falko to go and develop too near to the *ala loa*. It is in the best interest of all parties to go back and negotiate and work together. Hopefully as Mr. Bynum said, maybe there is an easier way to get a closer vehicular access in the future with future plans. Let us negotiate. Let us not just stop where we are as if we cannot do anything. I think this gives us the opportunity, it gives Falko the

opportunity to show the public that we can be good neighbors and we can work together and find solutions for our future and our children. Thank you.

Chair Nakamura:

Thank you. Councilmember Rapozo

Mr. Rapozo: Thank you, Madame Chair. First of all, I appreciate the deferral. I guess what I am interested in and it is probably in Executive Session, is what legal options do we have at this point going forward? I think it is very clear that the Committee is concerned about what is going on with that development. The question is, how do we fix it? I just have the website here and I am looking at it and it is amazing. This is an agriculture parcel and there is no reference to farming. I mean it is everything else, I take that back. There is one that says, there is one (1) five (5) acre farm that is going to be on there. So, they are going to build an organic farm and everyone is going to be able to rely on that farm to meet the agriculture requirements while they build their palaces, and it is eighty (80). Although they say the actual home site number would be your decision, our entitlement is for up to eighty (80) units. So, that is what it is. What is our authority now? What can we do? I would like to have that discussion in Executive Session. The other thing I would ask is that we have this project itself on the agenda, Madame Chair, in open session, so that the Department of Planning can be here to explain the project. Again, is there an opportunity for this County? It is rough when they have subdivision approval. I am not sure what we can do, but I know there has got to be an opportunity for us to make this right. I know that the landowner or the developer is going to hear about it, if he has not already, I would think he would be wanting to cooperate with the County and offering some concessions for the public because like I stated earlier, that *ala loa* is critical. I am not approving anything until we get some sort of commitment that we are going to identify that *ala loa* and unfortunately that does not appear based on what the State has written that they are interested. But we have not asked them on this specific parcel and I think we need to do that. A lot of it was reference today for prior comments made by the DLNR and the Attorney General. It is good to know, but I am more interested in – I guess if staff could note, if we could send over communication to the Governor with a cc to the DLNR. I want the Governor to look into this because you think it is his *kuleana*.

The other issue is OHA. To not even consult with OHA, I think, is a travesty. I think we need OHA's input as well. This should have all been done at the planning level, but it was not. It is water under the bridge. Now, we have to try to fix this and I guess my question to the Attorneys and to everyone else is what authority do we have? What mechanism do we have to go back and re-open this? There are many decisions of the past that I wish we could take back. A week ago it was simply on the agenda to approve a simple legal document; a Grant of Easement. That is what was on the agenda I tell you what, it was set to pass. If not for the testimony submitted by the Kallai's, Mr. Spacer, and a couple of others, we would have not asked for the deferral. I asked for the deferral because they have raised some questions that I could not answer and now look where we are at, from a six (6) lot subdivision to an eighty (80) unit mega resort. I appreciate the communities input. But again, what was just a legal document turned out to be now a really big, big project for this body. So, I appreciate the deferral. I was going to ask for that. I am glad we are going to get it and I would ask for a separate posting, if you can agree Madame Chair, to have a discussion on this project itself. I am more specifically interested in how do we commit these buyers to farming because it is an agriculture parcel? How do we commit that? If that five (5) acre parcel is sufficient for eighty (80) units to all benefit from one farm, a five (5) acre

farm, it is relates to a three hundred sixty (360) acre parcel. Something is not right. Thank you.

Chair Nakamura: Councilmember Yukimura.

Ms. Yukimura: Yes, well to address first the question that Councilmember Rapozo just raised, I believe the issue is not how to get those people to farm, but how to change our Agriculture Subdivision Ordinance so it does not allow what are basically Country estates and how ho have an Agriculture Ordinance that actually yields agriculture and farms. I believe that is the main question. I also want to say, Chair, that I had asked to have Ian Jung come up and talk about the issue of pedestrian only, not bikes. I would just like to have him answer that question quickly in case more research is needed for the next meeting.

Chair Nakamura: That would be fine.

There being no objections, the rules were suspended.

Chair Nakamura: Mr. Jung, we have a few more questions for you. Can you just introduce yourself for the record?

Mr. Jung: Deputy County Attorney, Ian Jung.

Ms. Yukimura: Ian, is it true that no bikes will be allowed on this access?

Mr. Jung: It is referenced within the easement document that no bikes will be allowed, no bikes or horses. But if you folks want to change the character of pedestrian to actually allow bike and horse, you can certainly do that. It is up to you folks.

Ms. Yukimura: Well, I am concerned on a wider basis that when we look at our easements that we make sure that they are multi-use in nature because we are wanting to create walkable/bikeable places. I am concerned from a policy standpoint that we would be negotiating these agreements that do not allow bikes. I do not mean that these accesses or trails have to be paved, but I think mountain bikes may work and who knows depending on the terrain even regular bikes may work, at least no prohibition. Especially thinking long-term, fifty (50) to one hundred (100) years, who knows.

Mr. Jung: Sure.

Ms. Yukimura: Great, thank you.

There being no objections, the meeting was called back to order, and proceeded as follows:

Chair Nakamura: Councilmember Hooser.

Mr. Hooser: Thank you, Chair. As a non-Committee member, I wanted to just have a few brief remarks, if I may? I want to thank you, Chair, for putting this on the agenda and Councilmember Rapozo, especially. A lot of times these things slip through. They are just kind of routine, everybody votes yes, and we are all busy doing different things. Councilmember Rapozo, thank you

very much for paying attention. I would like to, if we could, get the subdivision documents here so we can all look at them. We do not all need our own copy maybe, but if we can look at them to see what other provisions may be in there that we want to support or not support. It does unfortunately, echo bad dreams of Keālia Kai. At the end of the day I think we did improve that project as a Council. Again, your decisions on this easement relate a lot to the scope of the project. As a Councilmember, I talked about wanting to preserve the remoteness and we do not want too many people down here and I in principle supports that. Now you are looking at something where you have eighty (80) home sites and if there are one hundred sixty (160) people, there is only two (2) people that hunt the beach every day with their chairs and coolers and the public is slogging in from the road, walking through the weeds because we do not know if anyone is going to do it or not, carrying their coolers to get down to the beach which is a public beach. I believe that the subdivision is a public benefit that we are offering to a private landowner and the public needs to be compensated for that. As a result of this subdivision and as a result of our action, the landowner potentially makes millions and millions of dollars. In return for that, the public deserves some basic protections. I applaud the community and specifically Councilmember Rapozo and I am on track in supporting that same direction. Thank you. Even though I am not a member of the Committee, I appreciate it.

Chair Nakamura: Thank you for your comments. Any further discussion? Then if not, I will entertain a motion to number one, schedule an Executive Session on August 28, 2012, then defer this matter to September 4, 2013, and also add in an item regarding the Kahuaina Subdivision Phase II.

Mr. Bynum moved to deferred PL 2013-03 to September 4, 2013 with the addition of a separate item regarding Kahuaina Plantation Subdivision Phase II and schedule Executive Session briefing on August 28, 2013, seconded by Mr. Rapozo.

Ms. Yukimura: Point of clarification.

Chair Nakamura: Yes.

Ms. Yukimura: The Kahuaina Subdivision Phase II will be a separate item on the agenda?

Chair Nakamura: Yes.

Ms. Yukimura: Thank you.

Upon motion duly made by Councilmember Bynum, seconded by Councilmember Rapozo, and unanimously carried, PL 2013-03 was deferred to September 4, 2013 with the addition of a separate item regarding Kahuaina Plantation Subdivision Phase II and schedule Executive Session briefing on August 28, 2013.

There being no further business, the meeting was adjourned at 12:21 p.m.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Allison S. Arakaki".

Allison S. Arakaki
Council Services Assistant I

APPROVED at the Committee Meeting held on September 18, 2013:

A handwritten signature in cursive script, appearing to read "Nadine K. Nakamura".

NADINE K. NAKAMURA
CHAIR, PLANNING COMMITTEE